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No. 22,165

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

V.3465

3465

PETER ANTHONY NOGA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF AND APPENDIX FOR THE APPELLEE

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

FILED

CECIL F. POOLE,
United States Attorney,

JUN 24 1968

MORTON HOLLANDER,
WILLIAM KANTER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
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No. 22,165

PETER ANTHONY NOGA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF AND APPENDIX FOR THE APPELLEE

JURISDICTIONAL STATEMENT

This action was instituted in the district court by the appellant pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover for injuries he sustained allegedly due to the improper driving of a government employee (R. 1-3). The district court granted the government's motion for summary judgment and dismissed the complaint on the ground that appellant's exclusive remedy against the United States lay

under the Federal Employees' Compensation Act, 5 U.S.C. (Supp. II) 8101 et seq. (R. 96-100). The jurisdiction of this Court rests on 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

On August 22, 1966, appellant Noga brought suit in the United States District Court for the Northern District of California, pursuant to the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq. (R. 1-3). In his complaint Noga alleged that he was injured while riding as a passenger in an automobile driven by one Dennis Bruce, a government employee, who assertedly was in the scope of his government employment. Noga sought judgment of \$1,000,000 from the United States.

On December 22, 1966, the United States moved for summary judgment (R. 10-12). In support of that motion the Assistant United States Attorney submitted an affidavit in which he asserted that Noga at the time of the accident was a government employee, and that he had filed a claim under the Federal Employees' Compensation Act which had been approved by the Bureau of Employees' Compensation (R. 11-12). ^{1/} The government contended that Noga's remedy under the F.E.C.A. was exclusive (5 U.S.C. 757(b)), and that his suit under the Tort Claims Act could not be maintained.

^{1/} The affidavit indicated that Noga was paid a sum of \$4,189.61 for the period of August 25, 1964, through July 31, 1966. It was further asserted that the minimum rate for total disability beginning August 1, 1966, was \$56.61 per week, and that Noga was currently receiving that amount or more under the Act.

That motion was opposed on the ground that the Federal Drivers Act, 28 U.S.C. 2679(b)-(e), took away Noga's right of recovery against Bruce, who assertedly was driving in the scope of his employment, and that thus he should be given a complete judicial remedy against the United States (R. 16-23).

On July 6, 1967, the district court accepted the government's position that the F.E.C.A. was Noga's exclusive remedy against the United States (R. 96-99, 272 F. Supp. 51). The government's motion for summary judgment was granted by order entered August 2, 1967 (R. 100).

This appeal followed (R. 101).

STATUTES INVOLVED

28 U.S.C. 1346(b) provides in pertinent part:

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The Federal Drivers Act, 28 U.S.C. 2679(b)-(e) provides in pertinent part:

Subsection (b), 28 U.S.C. 2679(b):

The remedy by suit against the United States as provided by section 1346(b) of this title for damage to property or for personal

injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

Subsection (c), 28 U.S.C. 2679(c):

The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States Attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

Subsection (d), 28 U.S.C. 2679(d):

Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

The Federal Employees' Compensation Act, 5 U.S.C. 751 et seq. (now 5 U.S.C. (Supp. II) 8101 et seq.) provides in pertinent part (Section 757(b)):

The liability of the United States or any of its instrumentalities under sections 751-756, 757-781, 783-791 and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute: Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.

SUMMARY OF ARGUMENT

The district court correctly held that appellant, who was eligible for and has received benefits under the Federal Employees' Compensation Act, may not recover tort damages from the United States under the Federal Tort Claims Act. The exclusivity provision of the Federal Employees' Compensation Act expressly provides that Noga's remedy under the F.E.C.A. shall be exclusive of any liability of the United States under "any

^{2/} Title 5 of the United States Code has been recodified, and the F.E.C.A. is now found at 5 U.S.C. (Supp. II) 8101 et seq. 5 U.S.C. 757(b), with minor modifications, is now found at 5 U.S.C. (Supp. II) 8116(c).

Federal tort liability statute." Moreover, the courts have consistently held that the F.E.C.A. is a government employee's exclusive remedy against the United States.

Nor does the Federal Drivers Act, 28 U.S.C. 2679(b)-(e) affect the exclusivity of the F.E.C.A. The exclusivity provision fully applies even where plaintiff has no tort remedy against the government driver individually.

ARGUMENT

THE DISTRICT COURT CORRECTLY
HELD THAT APPELLANT, WHO IS
ELIGIBLE FOR AND HAS RECEIVED
BENEFITS UNDER THE F.E.C.A.,
CANNOT MAINTAIN AN ACTION AGAINST
THE UNITED STATES UNDER THE TORT
CLAIMS ACT.

It is undisputed that appellant, who was a Government employee at the time of his accident, was eligible for, and has received, a compensation award under the Federal Employees' Compensation Act, 5 U.S.C. 751 et seq., R. 11, 23; Appellant's Brief p. 2. He cannot, therefore, obtain damages from the United States under the Tort Claims Act.

5 U.S.C. 757(b) ^{3/} expressly makes Noga's remedy under the F.E.C.A. "exclusive, and in place, of all other liability of the United States * * * to the employee * * * on account of such injury * * * in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute* * *" (Emphasis added.) The courts have consistently held that the remedy provided to a Government employee by the F.E.C.A. is his exclusive remedy against the United States: Johansen v. United States, 343 U.S. 427; Patterson v. United States, 359 U.S.

^{3/} 5 U.S.C. (Supp. II) 8116(c), as recodified.

495; Posegate v. United States, 288 F. 2d 11 (C.A. 9), certiorari denied, 368 U.S. 832; Balancio v. United States, 267 F. 2d 135 (C.A. 2), certiorari denied, 361 U.S. 875; Cobia v. United States, 384 F. 2d 711 (C.A. 10), certiorari denied, 390 U.S. 986. See and compare United States v. Demko, 385 U.S. 149.

Appellant contends, however, that despite the express language of 5 U.S.C. 757(b), and the consistent holdings of the courts, his Tort Claims Act suit may nonetheless be maintained because the Federal Drivers Act, 28 U.S.C. 2679(b)(e), assertedly took away a pre-existing remedy against the individual driver, Bruce. But, as we show below, there is no substance to this contention.

The Federal Drivers Act, 28 U.S.C. 2679(b)-(e), was enacted in 1961 to protect Government drivers from the threat and burden of suits and judgments resulting from driving for the Government. See H.Rept. No. 297, 87th Cong., 1st Sess.; S.Rept. No. 736, 87th Cong., 1st Sess.; 107 Cong. Rec. 18,499-18,500, 87th Cong., 1st Sess. The statute accomplishes that Congressional purpose by immunizing individual drivers from personal suits and judgments arising out of driving in the course of their employment, and by limiting the plaintiff to his remedy against the United States, under 28 U.S.C. 1346(b), the Federal Tort Claims Act.

Thus, 28 U.S.C. 2679(b) provides that "[t]he remedy by suit against the United States as provided by section 1346(b) of this title [Federal Tort Claims Act] for damage * * * or * * *

injury * * * resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee * * * whose act * * * gave rise to the claim."

It follows, therefore, that the Drivers Act in effect provides that claims for tort damages arising out of driving in the course of Government employment may not be asserted against the driver individually but must be asserted against the United States under the Federal Tort Claims Act.^{4/} And in order to implement that mandate, the Act further provides that actions which are instituted in State courts against Government drivers individually are, upon certification by the Attorney General that the driver was in the scope of his employment, to be removed to the United States district court and are to

^{4/} The General Services Administration, which was a primary sponsor of the bill, indicated that different approaches had been considered with respect to protecting Government drivers. See H. Rept. No. 297, supra, at pp. 7-8. One approach would have provided that the Government pay judgments entered against drivers individually, while another would have provided that the Government procure insurance to cover its employees' Government driving. These proposals were rejected however, in favor of the existing type of statute in part because the former entailed greater expense and difficulty of administration. Thus, the letter from the GSA noted that "[b]y this amendment the handling of suits against the employee driver personally would be fitted into the existing mechanism afforded by the Federal Tort Claims Act * * *" Id. at p. 8.

proceed as actions against the United States under the Federal Tort Claims Act. 28 U.S.C. 2679(d).

Under the Drivers Act, therefore, the settled rules of the Federal Tort Claims Act apply, and as noted above, the law is well settled that federal employees who are eligible for benefits under the F.E.C.A. cannot, in view of the express exclusivity provision of the F.E.C.A., maintain an action under the Federal Tort Claims Act.

The applicability of the exclusivity provision of the F.E.C.A., as those in all other workmen's compensation acts, does not turn on whether a more generous tort recovery would be available against the employer or another employee in a particular case. Congress intended the F.E.C.A. to wholly replace any tort liability of the United States to covered employees; in return the employees receive a fair substitute by way of the administrative compensation remedy "which would afford employees and their dependents a planned and substantial protection." S.Rept. No. 836, 81st Cong., 1st Sess., p. 23.^{5/}

5/ The Supreme Court has noted the clear advantages to a claimant of the comprehensive system of benefit payments under the Act. Johansen v. United States, 343 U.S. at 440-441. Compare Feres v. United States, 340 U.S. 135, 145. In addition, we point out that benefit payments under the F.E.C.A. may be quite substantial. Under the Act, benefits up to approximately \$1500 per month may be payable during an employee's disability. 5 U.S.C. (Supp. II) Appendix 756(c).

Appellant's reliance upon Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731 and Reed v. Yaka, 373 U.S. 410, for the proposition that the exclusivity provision of the F.E.C.A. shall not apply here, is entirely misplaced. Aside from the fact that those cases involve considerations peculiar to the law of admiralty, it is clear that they deal solely with the rights of maritime employees as against private employers. With respect to the rights of the maritime employees of the United States, the Supreme Court held in both Johansen v. United States, supra, and Patterson v. United States, supra, that the F.E.C.A. was the sole remedy available against the United States. The continuing validity of the Johansen and Patterson decisions was recently reaffirmed by the Supreme Court in Amell v. United States, 384 U.S. 158 at 160-161 and again in United States v. Demko, supra, 385 U.S. at 151-152. It is particularly significant that in Aho v. United States, 374 F. 2d 885 (C.A. 5), certiorari denied, 389 U.S. 930, the Fifth Circuit rejected the precise contention now reasserted here and flatly held that Reed v. Yaka, supra, did not apply to government seamen, and that such seamen could have no recovery against the United States in addition to the benefits provided by F.E.C.A.

Moreover, there is nothing in Jackson v. Lykes Bros. Steamship Co., supra, which indicates that the Supreme Court was overruling settled rules under the F.E.C.A. On the contrary, that case, as did Reed v. Yaka, supra, dealt solely with the

liability of a private shipowner. Thus even in the area of maritime law, Reed and Jackson have no bearing on the exclusivity of the liability of the United States under the F.E.C.A., and they clearly have no application here.

It is clear, therefore, the district court correctly held that Noga could not maintain his Tort Claims Act suit against the United States in view of the express bar of the F.E.C.A.^{6/}

In that connection, we wish to call to the attention of the Court that three other district courts have recently held that where a Government employee, who is covered by the F.E.C.A., is injured by a Government driver in the scope of his Government employment, the effect of the Drivers Act and the F.E.C.A. is to limit the injured person to his remedy against the United States for administrative compensation benefits. Beechwood v. United States, 264 F. Supp. 926 (D. Mont.); Van Houten v. Ralls, et al., D. Nev., Civil No. 1911-N, decided August 31, 1967, pending on appeal to this Court, No. 22,356;^{7/} Vantrease v. United States, W.D. Mich., Civil Action No. 5469, decided

^{6/} Contra: Gilliam v. United States, 264 F. Supp. 7 (E.D. Ky.), which we think was wrongly decided and which is pending on our appeal to the United States Court of Appeals for the Sixth Circuit, No. 18,644.

^{7/} A copy of the Van Houten opinion is reproduced in the Appendix to this brief, infra, pp. 1a-5a. See also Judge Thompson's earlier opinion reproduced in the Record pp. 61-71.

August 29, 1967, pending on appeal, C. A. 6, No. 18222.

Those cases, therefore, attest still further to the correctness of the district court's decision that in no event can Noga, who is eligible for and has received benefits under the F.E.C.A., recover damages from the United States under the Federal Tort Claims Act, and that the Drivers Act in no way affects that result.

8/ A copy of the Vantrease opinion is reproduced, infra, in the Appendix to our brief, pp. 6a-16a.

The Beechwood and Vantrease cases involve situations where the injured person sued the Government driver individually and where the United States removed the cases pursuant to subsection (d) of the Drivers Act for proceedings in the district court under the Tort Claims Act. In both instances the courts accepted our position that the bar of the F.E.C.A. required a dismissal of the action under the Tort Claims Act, and that the Drivers Act did not permit the injured person to proceed further against the driver. In the two Van Houten cases, Judge Thompson first held that a Tort Claims Act suit brought directly in the district court would not lie in view of the F.E.C.A. A second suit brought against the driver in the state court was removed to the district court and Judge Thompson has further held that the Drivers Act precludes recovery against the driver individually. See Appendix, infra, pp. 1a-16a. The second decision in Van Houten, as we noted above, is now on appeal to this Court.

9/ Appellant suggests (Br. 21-22) that a holding that his pre-existing tort recovery is replaced by the F.E.C.A. would violate due process because he would not receive a "substantial and effective equivalent" in place of his more lucrative tort remedy, relying upon Richmond Screw Anchor Co. v. United States, 275 U.S. 331.

In the first place, however, it appears that such contention is premature. The only effect of the judgment in this case is to deny appellant relief against the United States under the Tort Claims Act. It still remains to be seen whether in fact a tort remedy is available against Bruce.
(continued on next page)

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

CECIL F. POOLE,
United States Attorney,

MORTON HOLLANDER
WILLIAM KANTER,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

JUNE 1968.

9/ continued:

In any event, such constitutional argument is without foundation. Whatever considerations may be present in the area of patent infringement, with which the Richmond case was concerned, the Supreme Court has long ago held that due process is not violated by a statute which replaces a common law tort recovery with workmen's compensation benefits. New York Central R. R. Co. v. White, 243 U.S. 188, 197-202. Indeed, the Supreme Court has, since the Richmond case, made it clear that "the Constitution does not forbid * * * the abolition of old * * * [rights] recognized by the common law, to attain a permissible legislative object". Silver v. Silver, 280 U.S. 117, 122. See Nistendirk v. McGee, 225 F. Supp. 881 (W.D. Mo.) (upholds constitutionality of the Drivers Act).

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William Kanter

WILLIAM KANTER

Attorney,
Department of Justice,
Washington, D.C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss.

WILLIAM KANTER, being first duly sworn, deposes and says:

That on June 21, 1968, he caused three copies of the foregoing brief for appellee to be served by air mail, postage prepaid, upon counsel for appellant:

James D. Mart, Esquire
Hoberg, Finger, Brown, & Abramson
703 Market Street
San Francisco, California 94103

William Kanter

WILLIAM KANTER

Attorney,
Department of Justice,
Washington, D.C.

Subscribed and sworn to before me
this 21st day of June 1968.

[SEAL]

Angeline Johns
NOTARY PUBLIC

My Commission expires April 14, 1972.

A P P E N D I X

F I L E D

SEP 1 1967

OLIVER F. PRATT Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

---oOo---

JOHN C. VAN HOUTEN,

Civil No. 1911-N

Plaintiff,

vs.

RAY ARTHUR RALLS and GER-
ALD L. BYINGTON,

Defendants.

D E C I S I O N

This is an action for personal injuries arising out of a motor vehicle collision brought by John C. Van Houten, a federal employee acting within the scope of his employment, against Roy[sic] Arthur Ralls and Gerald L. Byington, federal employees acting within the scope of their employment. The suit was brought in the Seventh Judicial District Court of the State of Nevada, in and for the County of White Pine, and was removed to this Court as an action within the scope of 28 U.S.C. 2679. Plaintiff has moved to remand the case to the state court, and the United

States Attorney has moved to dismiss the action as one against the United States under 28 U.S.C. 2679(b) and 28 U.S.C. 1346(b) which is precluded as to this plaintiff because his exclusive remedy lies under the Federal Employees Compensation Act, 5 U.S.C. 757(b).

In a companion action (John C. Van Houten v. Ray Arthur Ralls, Gerald L. Byington and the United States of America, Docket No. 1838), brought in this Court under the Federal Tort Claims Act, this Court, on January 6, 1967, dismissed the action. The Court then concluded that plaintiff's sole remedy against the United States was under the Federal Employees Compensation Act and that the Court had no jurisdiction of the action against the individual defendants absent diversity of citizenship. The Court expressed the opinion, however, that inasmuch as a remedy against the United States was not available to plaintiff under the Federal Tort Claims Act, his suit did not fall within the purview of 28 U.S.C. 2679 and an action against the individuals was not barred. The present motions bring this problem before the Court for reconsideration.

The issue is one of federal law which should be determined by the federal rather than the state courts. If this Court should grant the motion to remand, a non-appealable order, the defense that the remedy by suit against the United States is exclusive [28 U.S.C. 2679(b)] would not be removed from the case (Cf. Fancher v. Baker, 240 Ark. 288, 399 S. W. 2d 280) and the Nevada Courts would be required to resolve this arguable problem

of interpretation of federal statutes. On the other hand, if this Court grants the motion to dismiss, the Court of Appeals for the Ninth Circuit may be called upon to make a definitive ruling for this Circuit.

Upon reconsideration, the Court has concluded that the motion to dismiss should be granted. The viewpoint expressed in the opinion filed in the companion case still has some merit as an argument under standard canons of statutory interpretation. But the net result is to attribute to Congress an intent when it adopted the Government Drivers Act amendment to the Federal Tort Claims Act which affronts common sense. Under that interpretation, a federal employee driver of a motor vehicle in the course of his employment is normally exonerated from personal liability, but not so if the injured person is another federal employee who has a claim for compensation under the Federal Employees Compensation Act. An intent to engraft such an incongruous exception to the general immunity from personal liability cannot be found in the language of the statute nor in the legislative history.

The Court's earlier viewpoint was founded on the statutory language, "the remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death * * * shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate."

The Court now has concluded that this plaintiff, although a federal employee having rights under the Federal Employees Compensation Act, is still a person to whom the statutory language, "the remedy against the United States provided by section 1346(b)" applies. Section 1346(b) encompasses "claims * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." This is exactly such a case, and there is no provision of the Federal Tort Claims Act which would disqualify Van Houten as a claimant or plaintiff thereunder. Congress, in the Government Drivers Act, 28 U.S.C. 2679(b), incorporated Section 1346(b) by reference as a description of the class of cases to which the exclusivity of the remedy against the Government and the immunization of the individual federal employee from liability apply. The fact that for some extraneous reason the particular plaintiff cannot successfully maintain suit under the Federal Tort Claims Act should not change the result. So, the fact that Van Houten, as a federal employee, has as his exclusive remedy his claim under the Federal Employees Compensation Act does not remove his case from the class of cases or claims described in Section 1346(b); that is to say, his is a claim for personal injuries caused by a federal employee under

circumstances where a private person would be liable to respond in damages under Nevada law. See: Hoch v. Carter (S.D. N.Y. 1965), 242 F. Supp. 863; Fancher v. Baker, supra; Perez v. United States (S.D. N.Y. 1963), 218 F. Supp. 571; Uptagrafft v. United States (4th Cir. 1963), 315 F. 2d 200; Adams v. United States (S.D. Ill. 1965), 241 F. Supp. 383.

The action will be dismissed. The basic intent of Congress to protect a Government driver from exposure to personal liability cannot be carried out by the statutory interpretation developed in the companion case. Presumably this demonstration of schizophrenia in the judicial process will prove frustrating to the plaintiff in this case, but having been persuaded that the earlier decision was wrong, the fairest course we can take at this point is to say so.

An order will be entered accordingly.

Dated: August 31, 1967.

BRUCE R. THOMPSON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMMY J. VANTREASE,)	
)	
Plaintiff,)	
)	Civil Action
vs.)	
)	No. 5469
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Before HON. W. WALLACE KENT, Chief Judge.

Kalamazoo, Michigan, August 29, 1967.

OPINION OF THE COURT

ANTOINETTE DUDA
Official Court Reporter
418 Federal Building
Grand Rapids, Michigan

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SAMMY J. VANTREASE,)	
)	
Plaintiff,)	
)	Civil Action
vs.)	
)	No. 5469
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Before HON. W. WALLACE KENT, Chief Judge.

Kalamazoo, Michigan, August 29, 1967.

APPEARANCES:

MARCUS, McCROSKEY, LIBNER,
REAMON, WILLIAMS & DILLEY,
Grand Rapids, Michigan,
By MR. J. WALTER BROCK,

on behalf of the Plaintiff;

MR. JAMES W. EARDLEY,
Assistant United States Attorney,

on behalf of the Defendant.

THE COURT: This is the government's motion for a summary judgment, on the ground that the suit by the plaintiff is barred by the provisions of Title 28, U.S.C.A., Section 2679(b).

The case could be disposed of summarily by pointing out that in the file there appear the following: A complaint filed in the Circuit Court for Calhoun County; the usual papers filed on removal; a motion for substitution, which has been previously decided; an answer filed by the United States, which was substituted for the defendant Dorr Cameron; and a motion for judgment on the pleadings and a motion for summary judgment. There is no motion for remand, although the point was made during the course of the arguments on the motion for substitution of defendants.

Briefly, the cause of action arises out of an occurrence on December 8, 1964, when the plaintiff was injured while working as a Post Office employee when struck by an automobile driven by Dorr Cameron, a Post Office employee driving in the scope of his employment.

The case was removed, and the government substituted, under the provisions of Section 2679(d) of Title 28.

The government's motion is based on the

theory that Section 2679(b) of the statute makes the remedy against the United States the exclusive remedy; that there are no rights against anyone else; that the plaintiff has been paid compensation under the Federal Employees' Compensation Act, 5 U.S.C.A., Section 757, which in Section 757(b) provides that government employees eligible for compensation may not sue their employer, the United States.

This case has been before other courts. In *Beechwood v. United States*, 264 F.Supp. 926, a decision of the District Court in Montana, on almost exactly the same facts, the court said:

"The plaintiff's remedy against the United States is limited to recovery under the Federal Employees' Compensation Act and the United States' motion for summary judgment should therefore be granted. The case is dismissed and not remanded because plaintiff has no remedy against Selma Meathrel." Citing the statute. And paraphrasing: The act "insulates a federal employee from liability for injuries to another arising out of motor vehicle accidents happening in the course of federal employment."

The government has called to the Court's

attention a decision in the Northern District of California in 1967, not yet reported: Noga v. United States. A copy of the opinion is attached to the government's brief. And quoting from the opinion:

Plaintiff "argues as follows: * * * To preclude plaintiff from a remedy after the passage of the Federal Drivers Act would be to impute to Congressional action an intent, admittedly absent, to cut off completely the remedy he previously had because he is fortuitously injured in a motor vehicle accident.

"The Court does not agree with plaintiff's argument. What Congress would or would not have done if it had considered a particular problem is a profitless line of inquiry when general statutes can be found which set forth the law clearly. Section 2679(b) of 28 U.S.C. provides that the exclusive remedy of a person injured by the government employee driver of a motor vehicle is against the United States. This statute eliminates plaintiff's remedy against the driver, individually, which he had before 1961." Citing the Workmen's Comp. Act: "...provides that the exclusive remedy against the United States for an employee for injuries sustained in the course of his

employment is under the Federal Employee's Compensation Act. This statute precludes an employee from suing the United States under the Federal Tort Claims Act for injuries sustained while in the scope of his employment. Together these two statutes provide that plaintiff in the instant case has no cause of action against the United States other than under the Federal Employees' Compensation Act."

And it should be pointed out that the plaintiff in this case does not claim any cause of action against the Government of the United States. The plaintiff concedes that he has no cause of action against the United States, but claims that he should be permitted to pursue his common law remedies against Dorr Cameron, who was the defendant in the state court action, and calls attention to the opinion of Judge Mac Swinford, of the Eastern District of Kentucky, in *Gilliam v. United States*, 264 F. Supp. 7.

Judge Swinford reached the conclusion, in the reported case as well as in an earlier unreported decision, that if Congress had intended to abolish the right to sue, it would have expressly indicated so, meaning the right to sue the individual doing the injury.

We must respectfully disagree with Judge Swinford.

In the legislative history relating to this statute, and from the language of the statute, itself, it appears obvious that the intent of The Congress was to insulate government employees from suit where they might otherwise be liable in a common law action for negligence if such negligence was in the course of driving an automobile in the scope of their employment by the United States.

The government has not passed any other statute which has been called to this Court's attention which would insulate a government employee from suit for his negligent acts. The government has very definitely excluded suits by any person under the provisions of Section 2679(b) of Title 28, under the circumstances set forth in that section.

The sole cause of action where a driver driving in the scope of his employment as a government employee injures another person is by suit against the United States. As conceded by the plaintiff here, he cannot maintain a suit against the United States.

This Court is satisfied that, as pointed out by the California decision, indulging in speculation as to what The Congress would or would not have done if it had considered a specific problem which is now before the Court

is a profitless line of inquiry. Congressional attitudes are not that predictable.

The purpose of The Congress was very clear, and is still clear. The purpose of The Congress in enacting the statute as it did in 1961 was to prevent suits against drivers of government vehicles, or vehicles operated for the government, when the employee was operating within the course of his employment.

In Judge Mac Swinford's opinion, he cites with approval and, in fact, may rely upon *Marion v. United States*, 214 F.Supp. 320.

As pointed out by counsel in this case, the *Marion* case has been cited as authority for a contrary result than that reached in California and Montana, in the *Noga* case in California and the *Beechwood* case in Montana.

However, an examination of the *Marion* case makes it obvious that the point which is now before the Court was not before the Court in the District Court for Maryland in the *Marion* case.

In that case, the accident in question occurred on August 27, 1959. On August 25, 1961, plaintiff instituted a suit under the Federal Tort Claims Act. The injured person was a Federal employee; the driver of the

vehicle inflicting the injury was driving a privately-owned vehicle, but driving in the course of his employment as a government employee. The Court granted summary judgment as to the United States, and let the suit stand as to the co-employee defendant.

In reality, the Marion case is of no authority or consequence in the consideration of the rights of the parties here, since it appears that Section 2679(b), making the suit against the government the exclusive remedy, was embodied in Public Law 87-258 of the Public Laws enacted in 1961, and it was provided, in Section 2 of the act, without reading in detail:

"The amendments made by this act," which includes Section (b), "shall be deemed to be in effect six months after September 21, 1961, but any rights or liabilities then existing shall not be affected."

In the Marion case, the claim came into existence in 1959; suit was instituted before the effective date of the statute. So while the motion was decided after the effective date, it doesn't make any difference.

So the government's motion for summary judgment is granted for the reasons herein stated.

And you may present an appropriate order,

Mr. Eardley.

MR. EARDLEY: Thank you, Your Honor.

THE COURT: All right.

MR. BROCK: One further thing, Your Honor.

If we submit a motion to remand, could we submit that along with the order denying the motion to remand, all at the same time, and not have further oral arguments and briefs?

THE COURT: Certainly. I don't know any reason why not.

MR. BROCK: That would just keep the record straight.

THE COURT: Yes. That is not the reason for the Court's decision, although it might be a meritorious reason. That is not the reason for it. I would rather decide it on what I consider to be the merits of the controversy rather than the technical question.

MR. BROCK: I understand that, Your Honor.

THE COURT: So you are at perfect liberty to include in the file, before the order is prepared, a motion to remand, and include in the order, or Mr. Eardley can include in the order, a denial of the motion to remand.

MR. BROCK: Fine. Thank you, Your Honor.

THE COURT: All right. We will recess.

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

I, Antoinette Duda, Official Court Reporter,
do hereby certify that the foregoing is a full, true and
correct transcript of the opinion of the court in this
matter, according to my original stenographic notes.

Official Court Reporter
United States District Court
Western District of Michigan

No. 22165

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER ANTHONY NOGA

APPELLANT,

v.

UNITED STATES OF AMERICA

APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT

HOBERG, FINGER, BROWN & ABRAMSON
By JAMES D. MART
703 Market Street
San Francisco, California 94103

ATTORNEYS FOR APPELLANT

FILED

MAR 12 1968

WM. B. LUCK CLERK

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No. 22165

PETER ANTHONY NOGA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the judgment entered in favor of the appellee, the United States of America, on August 2, 1967, by the United States District Court for the Northern District of California, pursuant to said Court's order granting appellee's motion for summary judgment. The complaint for damages was brought by the plaintiff, Peter Anthony Noga, for personal injuries under the authority of the Federal Torts Claim Act, 28 U.S.C. Sections 1346 (b) and 2671-80 (R.1). The District Court's jurisdiction was invoked under 28 U.S.C. § 1346 (b) (R.1). On July 7, 1967, the District Court ordered that appellee's motion for summary judgment be granted and that judgment be entered in favor of appellee (R. 96-99). Appellant filed a timely notice for appeal on

August 7, 1967. The Court's jurisdiction accordingly rests upon 28 U. S. C. § 1291.

STATEMENT OF THE CASE

On August 24, 1964, appellant, a forestry aid for the United States Government, sustained severe personal injuries in an automobile collision rendering him a quadriplegic while an occupant in an automobile operated by Dennis Bruce, a fellow employee, in the course and scope of their employment with the United States (R. 1-3, 22).

A complaint seeking general damages in the sum of \$1,000,000.00, medical expenses, and loss of earning power was filed on August 22, 1966 by appellant against the United States (R. 1-3). Appellant alleged that the injury was caused by Dennis Bruce in the operation of his motor vehicle in the course and scope of his employment. The complaint contains allegations of negligence and wilful misconduct (R. 1-3).

On August 24, 1966, the Bureau of Employees Compensation entered its determination that plaintiff was entitled to compensation under the Federal Employees Compensation Act (5 U. S. C. §§ 751-802) upon a finding that the injuries were incurred by plaintiff in the performance of his duties as a forestry aid for the United States of America (R. 11, 23).

United States filed a motion for summary judgment on December 22, 1966 on the grounds that plaintiff's only remedy against the United States is under the Federal Employees Compensation Act (R. 10-12). Said motion was granted by the District Court on July 7, 1967 (R. 96-99). This appeal follows (R. 101).

SPECIFICATION OF ERROR

The granting of motion for summary judgment on the grounds

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1 that appellant is precluded from recovery against the United States
2 because of the exclusive remedy provision of the Federal Employees
3 Compensation Act (5 U.S.C. §757b) is error. A federal employee can
4 recover in tort against the United States for injury sustained as a result
5 of the negligent operation of a motor vehicle by a fellow federal employee
6 in the course and scope of their employment pursuant to the dictates of
7 the Federal Drivers Act.

8 SUMMARY OF ARGUMENT

9 Prior to the enactment of the Federal Drivers Act, amending
10 the Federal Torts Claim Act in 1961, the Federal Employees Compensation
11 Act, 5 U.S.C. §§ 751-802, was the exclusive remedy against the
12 United States by civilian employees for personal injuries sustained in
13 the performance of their duties. See 5 U.S.C. §757 (b). Before 1961,
14 such employees clearly had a common law right to recover against their
15 fellow employees in tort, even though both were acting within the course
16 and scope of their employment for the United States. Allman v. Hanley,
17 302 F. 2d 599 (5th Cir. 1962) and Marion v. United States, 214 F. Supp.
18 320 (Md. 1963).

19 In 1961, the Federal Drivers Act was enacted by Congress
20 providing that suit against the United States shall be the exclusive remedy
21 for injuries resulting from the operation of a motor vehicle by a
22 government employee within the course and scope of his employment.
23 The 1961 enactment establishes a procedure for substituting the United
24 States as a defendant in place of the government driver. The clear
25 intent of Congress in enacting the Federal Drivers Act is to protect
26 the federal driver from financial disaster by shifting the financial

responsibility from the driver to the federal government while not depriving injured persons of their judicial remedies for the injuries. Congress did not at any time express any intent to repeal the common law right of an injured federal employee who has received compensation under the F.E.C.A. of his judicial remedy against his fellow employee for the operation of the motor vehicle. Historically, the Federal Courts do not abrogate common law rights unless expressly directed to do so by Congress. See Marion v. United States, supra, and Allman v. Hanley, supra.

The optimum interpretation and construction of the statutory provisions in question is one that accomplishes the ends of Congress in enacting the Federal Drivers Act while at the same time preserving the judicial remedy in tort of the injured federal employee. The only way that this can be accomplished is to allow the injured federal employee to proceed against the United States as a technical defendant substituted in place of the negligent federal driver.

Such an interpretation not only carries out the purpose of the Federal Drivers Act in protecting federal employees but avoids the unjust and inequitable result of denying recovery solely upon the ground that the injured party is an employee of the United States. Such an interpretation avoids the illogical denial of a judicial recovery based solely upon the fortuitous fact that the injury was a result of a vehicular accident rather than a non-vehicular accident. The reversal of the judgment of the Court below follows the recent Supreme Court decisions of Jackson v. Lykes Steamship Co. 386 U.S. 731, 18 L.ed. 2d 488, 87 S.Ct. 1419 (1967) and Reed v. Steamship Yaka, 373 U.S. 410, 10 L.ed.

2d 448, 83 S.Ct. 1349 (1963) where recovery was permitted for a traditional common law remedy by refusing to apply a federal statute establishing compensation benefits as the exclusive remedy against the employer. Further support is found in Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 72 L.ed. 303, 48 S.Ct. 194 (1928) compelling recovery under analogous circumstances so as to avoid an unconstitutional construction of federal statutes.

APPLICABLE STATUTORY PROVISIONS

1. 28 U.S.C. §2679, as amended in 1961 (hereinafter referred to as the Federal Drivers Act) at the time of the accident provided:

"(b) The remedy by suit against the United States as provided by section 1346 (b) of this title for damage to property or for personal injury, including death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

"(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an

1 "attested true copy thereof to his immediate superior or
2 to whomever was designated by the head of his department
3 to receive such papers and such person shall promptly
4 furnish copies of the pleadings and process therein to the
5 United States attorney for the district embracing the place
6 wherein the proceeding is brought, to the Attorney General,
7 and to the head of his employing Federal agency.

8 "(d) Upon a certification by the Attorney General that the
9 defendant employee was acting within the scope of his
0 employment at the time of the incident out of which the suit
1 arose, any such civil action or proceeding commenced in
2 a State court shall be removed without bond at any time
3 before trial by the Attorney General to the district court of
4 the United States for the district and division embracing
5 the place wherein it is pending and the proceedings deemed
6 a tort action brought against the United States under the
7 provisions of this title and all references thereto. Should a
8 United States district court determine on a hearing on a
9 motion to remand held before a trial on the merits that the
0 case so removed is one in which a remedy by suit within the
1 meaning of subsection (b) of this section is not available against
2 the United States, the case shall be remanded to the State court.

3 "(e) The Attorney General may compromise or settle
4 any claim asserted in such civil action or proceeding in the
5 manner provided in section 2677, and with the same effect.

6 June 25, 1948, c. 646, 62 Stat. 984; Sept. 21, 1961, Pub. L.

87-258, §1, 75 Stat. 539."

2. 5 U.S.C. §757 (b) at the time of the instant accident provided¹
as follows:

"The liability of the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceeding in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any federal tort liability statute: provided, however that this section does not apply to a master or a member of the crew of any vessel."

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1. 5 U.S.C. §757 (b) is now contained in the Federal Compensation Act as 5 U.S.C. §8116 (c). The change was part of the recodification of Title 5 of the U.S.C. See Publ. 89-554, 80 Stat. 378, September 6, 1966.

87-258, §1, 75 Stat. 539. "

2. 5 U.S.C. §757 (b) at the time of the instant accident provided¹
as follows:

"The liability of the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceeding in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any federal tort liability statute: provided, however that this section does not apply to a master or a member of the crew of any vessel. "

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1. 5 U.S.C. §757 (b) is now contained in the Federal Compensation Act as 5 U.S.C. §8116 (c). The change was part of the recodification of Title 5 of the U.S.C. See Publ. 89-554, 80 Stat. 378, September 6, 1966.

ARGUMENT

A. PRIOR TO THE 1961 ENACTMENT OF THE FEDERAL DRIVERS ACT, FEDERAL EMPLOYEES HAD A COMMON LAW RIGHT TO RECOVER DAMAGES FOR PERSONAL INJURIES IN TORT FROM A FELLOW EMPLOYEE EVEN THOUGH BOTH WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR FEDERAL EMPLOYMENT.

Civilian employees of the federal government are entitled to compensation benefits under the Federal Employees Compensation Act for disability or death of an employee resulting from personal injuries sustained while in the performance of his federal duties. 5 U.S.C. § 8102 (formerly 5 U.S.C. § 751). As originally enacted in 1916, the F.E.C.A. did not contain any language specifying it to be the federal employees' exclusive remedy against the United States. Of course, such language was unnecessary at that time because there was no other remedy available, as the United States was fully protected by the doctrine of sovereign immunity. The exclusive remedy provision was enacted in 1949 as a result of the development of the election of remedies doctrine in earlier cases under the Federal Torts Claim Act. See Dahn v. Davis, 258 U.S. 421, 66 L.ed 696, 42 S.Ct. 320 (1919), United States v. Marine, 155 F. 2d 456 (4th Cir. 1946), Johnson v. United States, 186 F. 2d 120 (4th Cir. 1950), Parr v. United States, 172 F. 2d 462 (10th Cir. 1949), Cannon v. United States, 188 F. 2d 444 (9th Cir. 1951), Ocasio v. United States, 99 F. Supp. 601 (D.P.R. 1951), Brown & Root v. United States, 92 F. Supp. 257 (S.O. Tex. 1950). The election of remedies doctrine was aptly stated in Parr v. United States, supra, at pages 463-464:

1 "When the Federal Torts Claim Act became effective,
2 [the employee-claimant] had two remedies, each for the
3 same wrong, and both against the United States. One was
4 under the Employees Compensation Act, and the other was
5 under the Torts Claim Act. He then had the option to select
6 either remedy and follow it through. But he could not
7 invoke both. Effectively invoking constituted an election
8 which would preclude resort to the other."

9 If an employee elected not to proceed for compensation, suit
10 would lie under the Federal Torts Claim Act. Cannon v. United States,
11 supra.

12 In 1949 Congress added a section to the F.E.C.A. expressly
13 providing that the compensation remedy shall be the exclusive remedy
14 against the United States for injuries sustained by federal employees
15 in the performance of their duties. See 63 Stat. 861, 5 U.S.C. §757 (b)
16 (now 5 U.S.C. §8116 (c)). Apparently the exclusivity provision was
17 a clarifying amendment to the F.E.C.A. See Johansen v. United States,
18 343 U.S. 427, 96 L.ed. 1051, 72 S.Ct.849 (1952) and Patterson v.
19 United States, 359 U.S. 495 3 L.ed.2d 971, 79 S.Ct. 838 (1959).

20 Significantly, it must be noted that while the F.E.C.A. is to be
21 the exclusive liability of the United States, it is conspicuously silent as
22 to the liability of the fellow federal employees who tortiously caused the
23 injury. Thus, the courts have held that federal employees who had
24 received compensation under the F.E.C.A. retain their common law
25 right to sue their fellow employee who negligently or tortiously caused
26 the injury, even though the injured employee was not able to proceed

against the United States under the Federal Torts Claim Act. The leading case is Allman v. Hanley, 302 F. 2d 559 (5th Cir. 1962), where a civilian employee of the United States instituted an action against the medical officers of the United States Air Force and a civilian doctor employed by the air force for injuries sustained as a result of negligent surgery. The Circuit Court of Appeals held that the F.E.C.A. did not abrogate the common law right of the employee to sue his negligent fellow employees. The court, relying on State court cases, pointed out at pages 563-564:

" . . . at common law servants mutually owed to each other the duty of exercising ordinary care in the performance of services and that they are liable for failures in that respect resulting in injury to a fellow employee. Most courts which have held the common law rule abrogated by workmen's compensation acts have done so on the basis of the wording of the particular statute in question." (Emphasis added)

The court, noting that the F.E.C.A. had no such wording, continued at page 564:

"It would have been a simple matter for Congress to have placed the restrictive language in the statute here under examination if it had so intended." (Emphasis added)

Another noteworthy case upholding the right a federal employee to sue his fellow employee is Marion v. United States, 214 F.Supp. 320 (D. Md. 1963), which involved a cause of action arising before the 1961 enactment of the Federal Drivers Act. In Marion, the injured federal

1 employee brought an action against the United States and his co-employee
2 for injuries sustained as a result of the negligence of the co-employee
3 in the operation of a motorcycle in the course and scope of his employ-
4 ment as an air policeman. Summary judgment was granted as to the
5 United States because of the exclusiveness of the F.E.C.A. remedy but
6 denied as to the co-employee. The court stated that the policy problem
7 as to whether or not the F.E.C.A. should deprive a federal employee of
8 his right to sue fellow employees is left to Congress to resolve rather than
9 the courts. The court shall not abrogate the common law right to sue a
10 fellow employee for his tort where Congress has been silent on the subject.

11 It must be stressed that Congress has to date continued to remain
12 silent and has not added any legislation to the federal compensation
13 statutes abrogating the common law remedy against fellow employees.

14 Clearly, if the instant accident occurred prior to the 1961
15 enactment of the Federal Drivers Act, the plaintiff, Peter Noga, would
16 have had his common law remedy in tort against his fellow employee,
17 Dennis Bruce.

18 B. IN 1961, THE FEDERAL TORTS CLAIM ACT WAS AMENDED
19 BY THE ENACTMENT OF THE FEDERAL DRIVERS ACT PROVIDING
20 THAT NO SUIT SHALL BE BROUGHT AGAINST A FEDERAL DRIVER
21 FOR DAMAGES RESULTING FROM THE OPERATION OF A MOTOR
22 VEHICLE WITHIN THE SCOPE OF HIS GOVERNMENT EMPLOYMENT
23 AND ESTABLISHING A PROCEDURE FOR SUBSTITUTING THE UNITED
24 STATES AS DEFENDANT IN PLACE OF THE FEDERAL DRIVER.

25 The Federal Torts Claim Act, enacted by Congress in 1946,
26 provided a judicial remedy for the first time against the United States

for persons who suffered injury as a result of the negligence or misconduct of the employees of the United States. See 60 Stat. 842. With the enactment of the Federal Torts Claim Act, an injured person could now proceed against the United States as well as the negligent federal employee where the employee was acting within the scope of his employment. See Larson v. Domestic & Foreign Corp., 337 U.S. 682, 93 L.ed. 1628, 69 S.Ct. 1457 (1949), holding that federal employees are personally liable for their tortious conduct.

In 1961, Congress enacted the "Federal Drivers Act" so as to provide that no suit shall lie against a federal driver for damages resulting from his operation of a motor vehicle within the scope of his employment. 75 Stat. 539, 28 U.S.C. §§2679 (b)-(e).

Federal Drivers Act provides that remedy by suit against the United States shall be the exclusive action for injury resulting from the operation of a motor vehicle by the federal employee within the scope of his employment. 28 U.S.C. §2679 (b). Where the suit is filed against the federal driver, the Attorney General is required to defend the civil action and, where necessary, remove the suit to the federal courts. 28 U.S.C. §§2679 (c)-(d). The action against the federal driver is deemed to be a suit against the United States and the United States must be substituted as defendant in place of its driver. Litinski v. Partko, 237 F. Supp. 688 (D.C. Pa. 1965); Eastman v. United States, 257 F. Supp. 315.

C. THE PURPOSE OF THE FEDERAL DRIVERS ACT WAS TO PROTECT THE FEDERAL DRIVER BY SHIFTING FINANCIAL RESPONSIBILITY TO THE GOVERNMENT. THERE WAS NO EXPRESSION

1 OF INTENT TO ABROGATE THE JUDICIAL REMEDY OF INJURED
2 FEDERAL EMPLOYEES WHO RECEIVED WORKMEN'S COMPENSATION.

3 The purpose of the Federal Drivers Act is stated in the Senate
4 Report No. 736, 87th Congress, 1st Sess. (1961) at page 1:

5 "The purpose of the Bill, as amended, is to provide
6 a method for the assumption by the Federal Government
7 of responsibility for claims for damages against its
8 employees arising from the operation by them of motor
9 vehicles in the scope of their government employment."

10 Clearly, Congress intended the legislation for the protection of
11 its employees. The United States was to assume financial responsibility
12 arising out of the operation of motor vehicles in the scope of government
13 employment and thus relieve its drivers from hazards of personal
14 liability stemming from driving motor vehicles in the course of official
15 duty. See S. Rep. No. 736, 87th Con. 1st Sess. (1961); H. Rep. No. 297,
16 87th Con. 1st Sess. (1961); 1961 U.S.C. Con. and Adm. News 2784-2797.
17 The legislative history and background of the Federal Drivers Act does
18 not indicate any intent on the part of Congress to deprive injured persons,
19 including federal employees, of any judicial remedy. In fact, the act
20 itself expresses a clear intent to provide a substitute remedy. See
21 Perez v. United States, 218 F. Supp. 571 (S.D. N. Y. 1963).

22 The Federal Drivers Act, as passed by Congress, represented
23 a practical and logical way of meeting the problem of accomplishing
24 the purpose of shifting the financial responsibility from the federal
25 driver to the United States. Two other proposals were before Congress
26 but were rejected because of the opinion that the Federal Drivers Act

1 offered greater simplicity in the administration with far less expense
2 to the government than the other proposals. The two other proposals
3 considered by Congress were: (1) indemnification of the employee driver
4 by the government, or (2) insurance covering employees obtained at the
5 government's expense. Both proposals were looked upon with disfavor
6 for similar reasons. The proposal calling for indemnification by providing
7 for payment by the government of any judgment rendered against an
8 employee driver presented the likelihood of considerable difficulties
9 in administration and heavy expense to the government and would permit
0 jury trial. The other proposal providing for the procurement of
1 liability insurance was believed to entail substantial and needless expense
2 to the government. See S. Rep. No. 736, 87th Con. 1st Sess. (1961);
3 H. Rep. No. 297 87th Con. 1st Sess. (1961); 1961 U.S.C.Con. and Adm.
4 News 2784-2797.

5 Significantly, the only purpose of Congress as to the rejected
6 proposals as well as the legislation enacted was to provide for the
7 shifting of financial responsibility from the employee driver to the
8 federal government. The means adopted (the Federal Drivers Act) to
9 accomplish this purpose was selected over the rejected proposals
0 merely because of efficiency and expense considerations. Certainly,
1 if Congress enacted either of the alternative proposals there could be
2 no doubt that appellant, Peter Noga, would still have his judicial remedy,
3 even though he received compensation under the F.E.C.A. and that a
4 judgment against Dennis Bruce would be satisfied by the government
5 or by insurance. Nowhere does Congress consider the effect of the
6 statute as applied to a federal employee who has received F.E.C.A.

1 benefits. The legislative history and background as well as the enacted
2 legislation does not indicate any purpose or intent of depriving any one
3 of his tort remedy including injured federal employees and should not
4 be construed in such a manner.

5 D. THE INSTANT APPEAL PRESENTS AN ISSUE OF STATUTORY
6 CONSTRUCTION AND INTERPRETATION OF FEDERAL DRIVERS ACT.

7 A federal employee whose injuries arise out of a fellow-
8 employee's negligent operation of a motor vehicle within the scope of
9 their employment can either maintain an action against the negligent
10 federal driver, whereby the Attorney General would be required under
11 the Federal Drivers Act to substitute the United States as defendant or
12 maintain an action directly against the United States. The only contention
13 by the appellee in opposition to the above is based upon the exclusivity
14 provision of the F.E.C.A. Thus, an issue of statutory interpretation
15 and construction is raised. As far as can be determined, this Court is
16 the first appellate court asked to consider the question. Various results
17 have been reached by the District Courts which have considered the
18 question. See Gilliam v. United States, 264 F. Supp. 7 (E.D. Ky. 1967),
19 Beechnut v. United States, 264 F. Supp. 926 (D. Mont. 1967), Noga v.
20 United States, 272 F. Supp. 51 (N.D. Cal. 1967)(The District Court's
21 opinion of the instant case) and the unpublished opinions incorporated as
22 part of the record herein at pages 59-71.

23 Three possible constructions of the statutes in issue exist:

24 (1) The federal employee can recover from the United States (by not
25 applying the F.E.C.A.) but cannot recover from the federal driver
26 (by applying the Federal Drivers Act), whereby the United States is

1 deemed substituted as defendant in place of the Federal driver. (2) The
2 federal employee cannot recover from the United States (by applying the
3 exclusivity provision of the F.E.C.A.) nor from the fellow employee
4 (by applying the Federal Drivers Act), thereby totally abolishing his
5 judicial remedy in tort. (3) The federal employee can recover from his
6 fellow employee (by not applying the Federal Drivers Act) but cannot
7 recover from the United States (by applying the exclusivity provision of
8 the F.E.C.A.), thereby failing to carry out the purpose of the Federal
9 Drivers Act.

0 The optimal construction and interpretation must be the one that
1 carries out the purpose of the Federal Drivers Act in protecting federal
2 employees while at the same time preserving the judicial recovery in tort
3 of the appellant. Only the first construction accomplishes this. The
4 latter two, as advocated by the appellee, fall short of the mark and should
5 be rejected.

6 E. THE CONSTRUCTION AND INTERPRETATION OF THE
7 FEDERAL DRIVERS ACT ALLOWING APPELLANT'S CAUSE OF ACTION
8 AGAINST THE FEDERAL DRIVER TO BE DEEMED AGAINST THE
9 UNITED STATES AS A SUBSTITUTED DEFENDANT NOT ONLY FULFILLS
0 THE PURPOSES OF THE STATUTE BUT PRESERVES APPELLANT'S
1 EXISTING COMMON LAW RIGHTS BY PROVIDING AN EQUIVALENT
2 JUDICIAL REMEDY AGAINST THE UNITED STATES.

3 1. The first possibility -- the federal employee can recover from
4 the United States (by not applying the F.E.C.A.) but cannot recover from
5 the federal driver (by applying the Federal Drivers Act), whereby the United
6 States is deemed substituted as defendant in place of the federal driver.

1 In the instant action, the United States is but a technical defendant
2 in place of its federal driver, Dennis Bruce, pursuant to the dictates
3 of the Federal Drivers Act. Appellant's right to maintain the action
4 is supported by analytical reasoning, congressional intent, and the
5 decisional law of the Supreme Court of the United States.

6 The congressional intent has been fully discussed heretofore.
7 See supra at pages 11-14. It will suffice to state here that Congress'
8 only purpose in enacting the Federal Drivers Act was to protect federal
9 employees by shifting the financial responsibility to the United States
10 for injuries sustained through the culpability of federal drivers. Congress
11 has not expressed any intent to deprive any injured person completely
12 of his judicial remedy for his injuries. It would be inconsistent with
13 logic to interpret Federal Drivers Act, clearly enacted for the benefit
14 of federal employees, as depriving federal employees of their existing
15 rights for full judicial recovery where their injury was caused through
16 the negligence of a fellow employee. It cannot be disputed that the
17 purpose of the Federal Drivers Act is fully accomplished by permitting
18 appellant to proceed against the United States in place of Dennis Bruce.

19 Further, such an interpretation of the statute avoids violating
20 the long-standing judicial rule of construction whereby the court shall
21 not abrogate common law rights where Congress is silent on the subject.
22 See Allman v. Hanley, 302 F. 2d 559 (1962) and Marion v. United States,
23 214 F. Supp. 320 (1963). The F. E. C. A. does not contain any language
24 abrogating the common law cause of action in tort by one employee
25 against a fellow employee for the latter's negligence. If Congress had
26 intended to do so, it would have been a simple matter to place such

1 restrictive language in the F. E. C. A. at the time of the enactment of
2 the Federal Drivers Act.

3 There is ample decisional law permitting judicial recovery against
4 an employer where Congress has enacted a system of compensation as
5 the expressed exclusive remedy against the employer. In Jackson v.
6 Lykes Steamship Co., 386 U.S. 731, 18 L.ed.2d 488, 87 S. Ct. 1419
7 (1967), the Supreme Court held that an action for the wrongful death of
8 a longshoreman alleging negligence and unseaworthiness against the
9 shipowner employer was not precluded by §5 of the Federal Longshoremen's
0 and Harbors Workers Compensation Act (33 U.S.C. §905) which provides
1 that compensation benefits to longshoremen under that act "shall be
2 exclusive and in place of all other liability of such employer to the
3 employee . . ." In that case, the longshoreman inhaled noxious gasses
4 and died while working on his employer's vessel on navigable waters.
5 The trial court dismissed the suit on the grounds that the exclusive
6 remedy provision of the longshoremen's act barred an action against
7 the shipowner employer. The Supreme Court granted certiorari,
8 reversed the judgment, and remanded the case for further proceeding.
9 The court's decision, following its earlier opinion in Reed v. Steamship
0 Yaka, 373 U.S. 410, 10 L. ed 2d 448, 83 S. Ct. 1359 (1963) was founded
1 upon the basic unfairness of having recovery depend upon the fortuitous
2 circumstances of how a longshoreman was employed. The court stated
3 as 18 L. ed 2d at page 491:

4 " . . . Yaka also stressed the fact that the traditional
5 humanitarian remedy for unseaworthiness was not to be
6 destroyed by the kind of employment contract that a

1 "shipowner made with the people who worked on it.

2 "In this case as in Yaka, the fact that the longshoreman
3 was hired directly by the owner instead of by the independent
4 stevedore company makes no difference as to the liability of
5 the ship or its owner. In the final analysis the contention
6 here against recovery as in Yaka is that the longshoreman
7 who is employed to work on a ship by an independent stevedore
8 company instead of the shipowner can recover for the unsea-
9 worthiness of the vessel, but a longshoreman hired by the
10 same shipowner to do exactly the same kind of work on an
11 unseaworthy ship cannot recover. We reject this contention
12 as we did before. We cannot accept such a construction of
13 the Longshoremen's Act--an Act designed to provide equal
14 justice to every longshoreman similarly situated. We cannot
15 hold that Congress intended any such incongruous, absurd,
16 and unjust result in passing this congressional Act."

17 (Emphasis added)

18 The same result was reached earlier in Reed v. Steamship Yaka,
19 373 U.S. 410, 10 L.ed.2d 448, 83 S.Ct. 1349 (1963), which involved a
20 libel in rem filed by a longshoreman to recover for injuries he sustained
21 while engaged in loading a vessel. In that case the shipowner was the
22 employer of the longshoreman. The sole defense was that the
23 longshoremen's act provides that the compensation benefits under the
24 act shall be exclusive and in place of all other liability on the part of
25 the employer. The court held that the exclusive remedy provision of
26 the Longshoremen's Act does not bar recovery for the traditional

1 humanitarian remedy for the unseaworthiness of a ship.

2 It is significant that the exclusive remedy provision of the
3 Federal Employees Compensation Act is substantially identical to the
4 language of the Longshoremen's Act. Both provide that the liability
5 of the employer "shall be exclusive, and in place of, all other liability
6 of" the employer to the employee. Jackson and Yaka stand for the
7 principle that an exclusive remedy provision enacted by Congress in a
8 compensation legislation must not be interpreted to bring about a harsh
9 and incongruous result not in keeping with the congressional intent to
0 provide certain protections for injured persons. Similarly, in the
1 instant case, a fair and just result can only be achieved by holding that
2 appellant's action in tort against the United States is not precluded
3 by the exclusive remedy provisions of Section 5 U.S.C. §757 (b).

4 Certainly, it was not the intent of Congress in enacting the
5 Federal Drivers Act to provide that the judicial recovery in tort by
6 an injured federal employee in the performance of his duties shall
7 depend upon the kind of accident. The fact that the federal employee
8 sustained his injuries as a result of a vehicular accident rather than
9 a non-vehicular accident should make no difference in his right to
0 recover for the negligence of a fellow employee in causing the injury.
1 As long as the injured federal employee is entitled to a judicial recovery
2 in negligence for non-vehicular injuries, the same right must exist
3 in the case of the motor vehicle accident. By permitting the appellant
4 to pursue his judicial remedy by substituting the United States as
5 defendant in place of the negligent federal driver, a harsh and incongruous
6 result based solely upon fortuity is avoided.

1 An injured federal employee must be permitted the right to
2 maintain an action against the United States where the injury was
3 caused by the negligent operation of a motor vehicle by a fellow employee
4 in the course and scope of their employment. Only then can the purpose
5 of Congress in acting the Federal Drivers Act be carried out fully while
6 at the same time arriving at a just and equitable result.

7 2. The second possibility -- the federal employee cannot
8 recover from the United States (by applying the exclusivity provision of
9 the F. E. C. A.) or from the fellow employee (by applying the Federal
0 Drivers Act) thereby totally abolishing his judicial remedy in tort.

1 The second possibility barring recovery from both the United
2 States and the fellow employee not only results in a harsh and incongruous
3 interpretation of the statute in question but is in violation of certain
4 constitutional guarantees of due process under the fifth amendment to
5 the Federal Constitution as well as in violation of the historical maxim
6 that courts do not abrogate common law rights where Congress remains
7 silent.

8 A spurious argument might be urged that the second possibility
9 fulfills the purpose of the Federal Drivers Act as it relieves the federal
0 driver from financial responsibility. But such an argument ignores the
1 congressional intent that the United States was to assume the respon-
2 sibility by providing a substitute remedy, thus clearly indicating that
3 Congress did not intend to deprive injured persons of their judicial remedy.
4 An interpretation precluding all recovery in tort to an injured federal
5 employee is contrary to the congressional purposes.

6 Furthermore, a construction barring all recovery would fly in

1 the face of the long-standing principle that the abrogation of common
2 law rights are best left to Congress and that the court shall not annul
3 such rights where Congress is silent on the subject. See Allman v.
4 Hanley, supra, and Marion v. United States, supra, and discussion
5 supra at pages 9-11.

6 If the Federal Drivers Act be construed as barring recovery by
7 appellant both from the United States and the negligent fellow employee,
8 such construction would be unconstitutional, as it would be abolishing a
9 vested right (appellant's cause of action for negligence against a fellow
0 employee) without due process of the law as protected by the fifth amend-
1 ment to the Federal Constitution. The Supreme Court has long held that
2 it is the court's duty in interpreting federal statutes to reach a conclu-
3 sion which will avoid serious doubt of the statutes constitutionality.

4 Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 72 L. ed 303
5 (1928), Phelps v. United States, 274 U.S. 341, 71 L. ed 1083 and Crowell
6 v. Benson, 285 U.S. 22, 76 L. ed 598 (1932).

7 Such an interpretation would result in taking away a lawful
8 claim for damage for injury against a private person, which but for
9 the Federal Drivers Act he would have against the private wrongdoer.
0 The question of unconstitutionality would be raised by the second
1 possibility's failure to provide a substantial and effective equivalent
2 in place of what would be taken away when applied to the injured federal
3 employee. The objection would not be present when the injured person
4 is not a federal employee as in that case there would be a substantial
5 and effective equivalent remedy against the United States.

6 The case in point is Richmond Screw Anchor Co. v. United States,

1 supra, involving a statutory interpretation of federal statutes under an
2 analagous situation. In that case, three statutes were involved. The
3 first enacted statute , Section 3477, Revised Statutes, U.S.C., Title 31,
4 §203, prohibited assignment of unliquidated claims against the United
5 States. The statute had previously been held applicable to claims for in-
6 fringement of patents, thereby rendering such claims void. The second
7 statute was the Act of 1910 providing that an invention covered by a patent
8 of the United States could be used by the United States without license and
9 that the owner shall recover reasonable compensation from the United
10 States in the court of claims. The last statute, the Act of 1918, amended
11 the Act of 1910 by providing that the remedy against the United States in
12 the Court of Claims shall be the exclusive remedy of the owner for infring-
13 ment of the patent. The purpose of the latter act was to relieve govern-
14 ment contractors who used patents without a license under the Act of 1910
15 from any liability so as to stimulate contractors to furnish what was need-
16 ed for war without fear of becoming liable for any infringement to the
17 owners or assignees of owners of patents. Appellant was the assignee of
18 a patent and was seeking to recover compensation from the United
19 States for patent infringements by a government contractor incurred
20 after the 1918 Act. The United States argued that Section 3477 applied
21 and rendered the assignment of the claim for infringement of patent void.
22 If the argument prevailed, appellant would have been barred completely
23 as the Act of 1918 precluded his cause of action against government con-
24 tractor. Such a result could only be avoided by not applying Section 3477
25 and holding that the Act of 1918 provided a just equivalent by allowing a
26 claim against the United States in place of the claim against the

1 government contractor. The court held that Section 3477 shall not
2 apply to claims for patent infringements by government contractors
3 after the enactment of the Act of 1918. The pertinent language of the
4 court is found at pages 344-346:

5 "It is settled that, but for the Act of 1918, the two assign-
6 ments vesting title in the Anchor Company would enable it to
7 recover from the contractor for all his infringements
8 ... If now §3477 applies and these assignments are
9 rendered void, the effect of the Act of 1918 is to take away
10 from the assignee and present owner not only the cause of action
11 against the government, but also to deprive it of the
12 cause of action against the infringing contractor for injury
13 by his infringement. The intention and purpose of
14 Congress in the Act of 1918 was to stimulate contractors
15 to furnish what was needed for the war, without fear of
16 becoming liable themselves for infringements to inventors
17 or the owners or assignees of patents. . . To accomplish
18 this governmental purpose, Congress exercised the power
19 to take away the right of the owner of the patent to recover
20 from the contractor for infringements. This is not a case
21 of mere declared immunity of the government from
22 liability for its own torts. It is an attempt to take away
23 from a private citizen his lawful claim for damage to his
24 property by another private person, which but for this
25 act he would have against the private wrongdoer. This result,
26 if §3477, Rev. Stat. applies and avoids the assignment,

1 "would seem to raise a serious question as to the consti-
2 tutionality of the Act of 1918 under the 5th Amendment
3 to the Federal Constitution. We must pr esume that
4 Congress in the passage of the Act of 1918 intended to
5 secure to the owner of the patent the exact equivalent
6 of what it was taking away from him. It was taking away
7 his assignable claims against the contractor for the
8 latter's infringement of his patent. The assignability
9 of such claims was an important element in their value
10 and a matter to be taken into account in providing for
11 their just equivalent. If § 3477 applied, such equivalence
12 was impossible.

13 "It is our duty in the interpretation of Federal statutes
14 to reach a conclusion which will avoid serious doubt of
15 their constitutionalty. . . Moreover, we should seek to
16 carry out in our dealing with the Act of 1918 and Revised
17 Statute, § 3477, the very important congressional purpose
18 of the former, as already explained, in the promotion of
19 the war as a special legislative intent. It is our duty to
20 give effect to that special intent, although it be not in
21 harmony with a broad purpose manifested in a general
22 statute avoiding assignment of claims against the govern-
23 ment enacted some eighty years ago. . . This is in accord
24 with general rules of interpretation, as shown in these
25 authorities, and reconciles § 3477, Revised Statutes,
26 and the Act of 1918, if we hold, as we do, that § 3477

1 "does not apply to the assignment of a claim against
2 the United States which is created by the Act of 1918,
3 in so far as the act deprives the owner of the patent
4 of a remedy against the infringing private contractor
5 for infringements thereof and makes the government
6 indemnitor for its manufacturer or contractor in his
7 infringements."

8 Applying the above reasoning to the instant case, Section 3477
9 of the Rev. Stat. has the same function as the exclusive remedy
0 provision of the F.E.C.A. The Act of 1918 has the corresponding
1 effect of the Federal Drivers Act. The right of the assignee of a patent
2 to recover from a government contractor for an infringement of a patent
3 prior to the Act of 1918 despite § 3477 requires that injured federal
4 employees, such as the appellant, have the right to recover from a
5 negligent Federal Drivers Act despite exclusive remedy provision of
6 F.E.C.A. In Richmond Screw Anchor Company, the purpose of the
7 special statute (Act of 1918) was given priority as must the purpose of
8 the Federal Drivers Act herein. In order to avoid serious doubt of
9 constitutionality the Act of 1918 was interpreted as providing a just
0 equivalent-claim against the United States in place of the claim against
1 the government contractor. In the instant case, the Court must interpret
2 the statute to provide that the appellant received a just equivalent - an
3 action against the United States as defendant in place of the action
4 against the federal driver.

5 3. The third possibility - the federal employee can recover
6 from his fellow employee (by not applying the Federal Drivers Act)

1 but cannot recover from the United States (by applying the exclusivity
2 provision of the F.E.C.A.), thereby failing to carry out the purpose of
3 the Federal Drivers Act.

4 The remaining possibility whereby an injured federal employee
5 can proceed against his fellow employee but not the United States by
6 not applying the Federal Drivers Act must also be rejected. While not
7 objectionable as abrogating a common law right, it does fail to satisfy
8 the purpose of the Federal Drivers Act to shift the responsibility for
9 the negligent operation of motor vehicles from the federal driver to the
10 United States. Obviously, the intent of Congress is to relieve its drivers
11 from hazards of personal liability and protect against financial disaster in
12 all situations where the accident is in the course of official duty.

13 In the case where the injured party is a fellow employee, the
14 federal driver's need for the protection of the Federal Drivers Act is
15 far greater than in the case where the injured person is not a fellow
16 employee. In the latter situation, where the federal driver had insufficient
17 insurance, the injured person would be satisfied with his remedy against
18 the financially solvent United States to satisfy any judgment. Thus,
19 the federal drivers would not be exposed to bankruptcy or the threat of
20 an outstanding judgment which might be satisfied out of his assets or any
21 inheritance or other financial benefits which might be received in the
22 future.

23 But where the injured person was a fellow federal employee,
24 the federal driver was in a more critical position, as the injured fellow
25 employee had only his remedy against him. Thus, the satisfaction of
26 a judgment out of federal driver's assets was a very real threat which

1 could result in bankruptcy, impairment of credit and depletion of savings
2 and loss of inheritance and other financial benefits in the future.

3 The federal driver would most likely not even have a choice as
4 to whether or not other fellow employees would ride in his vehicle
5 during their employment. Thus, the third possibility must also be
6 rejected for it not only fails to carry out the purposes of the Federal
7 Drivers Act but would be a harsh and incongruous result as to the
8 federal driver.

9 F. THE INESCAPABLE CONCLUSION IS THAT JUSTICE AND
0 LOGIC CAN ONLY BE SERVED BY ADOPTING THE OPTIMAL
1 CONSTRUCTION AND INTERPRETATION OF THE FEDERAL DRIVERS
2 ACT WHEREBY AN INJURED FEDERAL EMPLOYEE CAN PROCEED
3 DIRECTLY OR INDIRECTLY AGAINST THE UNITED STATES IN PLACE
4 OF THE FEDERAL DRIVER UNDER THE PROCEDURE ESTABLISHED
5 BY THE FEDERAL DRIVERS ACT FOR INJURIES SUSTAINED THROUGH
6 THE NEGLIGENT OPERATION OF A MOTOR VEHICLE.

7 Gilliam v. United States, 264 F. Supp. 7 (E. D. Ky. 1967)
8 represents an apocalyptic result combining analytical reasoning and
9 congressional intent to reach a sound and just construction of the appli-
0 cation of the Federal Drivers Act under the identical facts whereby
1 the injured federal employee is able to pursue the United States as
2 defendant substituted in place of the federal driver. Appellant's position
3 can best be summarized by adoption of the language contained in that
4 opinion. At page 9, the court stated:

5 "Now we find a situation in which if the Court followed
6 the reasoning of the United States Attorney's argument

1 would deny Miss Green any right of recovery at all,
2 irrespective of how gross the negligence, irrespective of
3 how seriously she may have been injured, she would have
4 no grounds for recovery. All she could expect would be
5 under the compensation law, payment for her hospital bill
6 and medical expenses. I can't conceive of placing a
7 construction or interpretation upon an act of Congress made
8 primarily for the protection of its own employees that would
9 deny another employee a right to make a claim for a just
10 recovery. This woman had a right at common law, she had
11 a right of action at common law, and here by a strained,
12 as I believe, construction, she is denied that right without
13 any direct and express act of Congress on the point. In
14 other words, while they pay to her her hospital bill and
15 medical expenses, they say to her, "We are going to
16 construe this law and the Congress intends in this law
17 to deny an employee of the United States any right to recover
18 for personal injuries' solely on the ground that you are an
19 employee of the United States Government.' It is a very ancient
20 legal maxim that there shall be no wrong without a remedy.
21 It is the body of the whole law that is built around that idea
22 and principle and yet to interpret this compensation law in
23 such a way would deny a common law right of action to one
24 of the government employees, solely on the ground that the
25 United States in another act, another statute, had volunteered
26 itself to replace or supplant any of its employees who might

1 be sued for damages growing out of an automobile injury."

2 The court continued at page 10:

3 "Under these facts and circumstances, it is my judgment
4 that inestimable wrong would be done Mrs. Gilliam by
5 denying her the right to seek redress for her alleged
6 injuries, growing out of the alleged negligence of the
7 operator of the car in which she was compelled to ride,
8 by denying her the right to prosecute a common law action
9 for a tort against her in the forum of her choosing. I do
10 not believe the Congress intended to go so far in its enact-
11 ment of the compensation or substitution statute when it was
12 in the minds of the legislators that they were passing
13 enactments for the benefit of employees and not to fore-
14 close their right to seek redress for wrongs committed
15 against them. The state compensation laws are for
16 immediate aid to the injured employee and as a protection
17 to the employer. There is no parallel between these laws
18 and the federal laws which the United States seeks to impose
19 here as a means of denying an allegedly just claim.

20 "I subscribe to the language of the Court in Brady v.
21 Roosevelt S.S.Co., 317 U.S. 575: 'We can only conclude
22 that if Congress had intended to make such an inroad on
23 the rights of claimants . . . it would have said so in
24 unambiguous terms' and 'in the absence of a clear
25 congressional policy to that end, we cannot go so far'."
26 (Emphasis added)

1 It is respectfully submitted that appellant can proceed directly
2 against the United States which is deemed defendant in place of the
3 federal driver. The judgment in favor of the United States must
4 therefore be reversed for the reasons contained herein.

5 Dated, San Francisco, California,

6 March 18, 1968.

7 HOBERG, FINGER, BROWN & ABRAMSON

8 By JAMES D. MART,

9 Attorneys for Appellant.
0

1 I certify that, in connection with the preparation of this brief, I
2 have examined Rules 18 and 19 ^{and 39} of the United States Court of Appeals for
3 the Ninth Circuit, and that, in my opinion, the foregoing brief is in full
4 compliance with those rules.
5

6 James D. Mart, Attorney for Appellant
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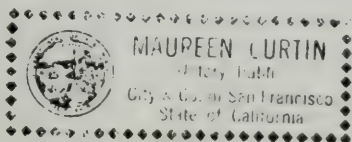
AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

GLORIA RIVARD being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, and not a party to the within action. This affiant's business address is 703 Market Street, 18th floor, San Francisco, California. That affiant served a copy of the foregoing Brief for Appellant by placing said copy in an envelope addressed to Morton Hollander and William Kanter, Appellate Section, Civil Division, Room 3706, U. S. Department of Justice, Washington 25, D. C. and Cecil F. Poole and Robert N. Ensign, 450 Golden Gate Avenue, San Francisco, California, which envelopes were then sealed and postage fully prepaid thereon, and thereafter was on March 19, 1968 deposited in the United States mail at San Francisco, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Subscribed and sworn to before me
this 19th day of March, 1968

Maureen Curtin
Notary Public
in and for the City and County of San
Francisco, State of California



AUG 23 1968

No. 22165

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETER ANTHONY NOGA

APPELLANT,

v. .

UNITED STATES OF AMERICA

APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF AND APPENDIX FOR APPELLANT

HOBERG, FINGER, BROWN & ABRAMSON
By JAMES D. MART
703 Market Street
San Francisco, California 94103

ATTORNEYS FOR APPELLANT

FILED

AUG 20 1968

WM. B. LUCK, CLERK

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2 IN THE UNITED STATES COURT OF APPEALS
3 FOR THE NINTH CIRCUIT

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No. 22165

PETER ANTHONY NOGA, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF AND APPENDIX FOR APPELLANT

PRELIMINARY STATEMENT

Little need be stated in reply to the argument contained in appellee's brief. Appellant's position with regard to the points raised has been amply stated heretofore in appellant's opening brief. Certain points bear emphasis.

ARGUMENT

Appellee asserts that the exclusive remedy provision of the Federal Employees Compensation Act is unyielding in all conceivable circumstances and cannot be subject to construction and interpretation despite potential conflict with subsequently enacted statutes. While it has been consistently stated in the past that the F.E.C.A. is the exclusive

remedy provided to an injured government employee, no appellate decision has been discovered involving the construction and interpretation of the F.E.C.A. exclusive remedy provision under a situation such as presented by the subsequent enactment of the Federal Drivers Act which shifts responsibility to the United States from the negligent government driver. Certainly, it does not follow that there cannot be a meritorious exception in light of the unusual and novel circumstances here presented. In no other way may an incongruous, absurd and unconstitutional result be avoided.

In order to have semblance of validity, appellee must circumvent the clear dictate of the Supreme Court in Jackson v. Lykes Bros. Steamship Co., 386 U. S. 731, 18 L. ed 2d 488, 87 S. Ct. 1419 (1967), and in Reed v. Steamship Yaka, 373 U.S. 410, 10 L. ed 2d 448, 83 S. Ct. 1349 (1963). In Jackson and Yaka, the traditional humanitarian remedy against the employer-owner for unseaworthiness of its vessel was held not to be barred by the exclusive remedy provision in the Longshoremen's Act providing workmen's compensation. It was said that such an interpretation and construction would bring about an "incongruous, absurd and unjust result" whereby recovery in tort depended fortuitously upon the kind of employment contract involved. Appellee seeks, without merit, to distinguish Jackson and Yaka because these cases dealt with the rights of maritime employees as against private employers. Certainly, there can be no less reason to avoid an "incongruous, absurd and unjust result" in determining the application of a congressional Act effecting the rights of employees as against the United States as an employer. The opposite should be true.

1 Appellee argues further that Jackson and Yaka cannot apply
2 because of Aho v. United States, 374 F. 2d 885 (5th Cir. 1967),
3 holding that government seamen cannot recover against the United
4 States except under the F.E.C.A. But Aho does not involve the type
5 of situation presented in either Jackson and Yaka or in the instant case.
6 Before the enactment of a workmen's compensation system for govern-
7 ment seamen, there was no remedy against the United States because of
8 the doctrine of sovereign immunity. See Aho v. United States, 272 F.
9 Supp. 990. The subsequent enactment of a system providing compensation
10 as an exclusive remedy against the United States as the employer of
11 seaman, does not destroy any traditional remedy against the United
12 States for unseaworthiness because none existed to be destroyed. But
13 in Jackson and Yaka, a remedy did exist against the private employer for
14 unseaworthiness before the Longshoremen's Act was enacted. As a result
15 these seamen were deprived of something. The same deprivation exists
16 with appellant. Government employees had a traditional common law
17 remedy in tort against a fellow employee before the enactment of the
18 Federal Drivers Act in 1961. See Allman v. Hanley, 302 F. 2d 599
19 (5th Cir. 1962) and Marion v. United States, 214 F. Supp. 320 (Md. 1963).
20 As to appellant, it is obvious that the application of the exclusive remedy
21 provision would bring about an "incongruous, absurd and unjust result"
22 founded upon mere fortuity.

23 Application of the exclusive remedy provision of the F.E.C.A.
24 would, in this case, bring about even more shocking results than that
25 in Jackson or Yaka because it violates the constitutional guaranty of due
26 process under the Fifth Amendment to the Federal Constitution and

and abrogates a judicial remedy by implication.

Appellee seeks summarily to dispose of the constitutional grounds.¹ Appellant does not disagree with the proposition that due process is not violated by a statute which replaces a common law tort remedy with workmen's compensation benefits (or another reasonably just equivalent). But appellee urges that the Federal Drivers Act does more than replace the common law tort remedy; for he urges that it completely abrogates it. It is noteworthy that the case relied upon by appellee, New York Central R. R. Co. v. White, 243 U. S. 188, 61 L. ed 667 (1917), emphasizes the distinction between a complete abrogation and a reasonable replacement at page 201.

"Nor is it necessary, for the purposes of the present case, to say that a state might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast

¹ Appellee, in its footnote No. 9, suggests that the constitutional argument is premature based upon its assertion that it remains to be seen whether or not a tort remedy is available against the fellow employee Dennis Bruce. Interesting enough, appellee in its summary of argument, states that the exclusive remedy provision applies to bar recovery against the United States even where appellant has no tort remedy against the government driver. Any interpretation and construction of the Federal Drivers Act and the exclusive remedy provision of the F. E. C. A. must take into account the effect of the legislation upon the tort remedy against the federal driver. Attached hereto as appendix are certain correspondence illustrating the attempts by Dennis Bruce as well as appellant to have the state court action removed to the federal court.

1 "industrial organization of the state of New York, for
2 instance, with hundreds of thousands of plants and
3 millions of wage earners, each employer, on one hand,
4 having embarked his capital, and each employee, on
5 the other, having taken up his particular mode of
6 earning a livelihood, in reliance upon the probable
7 permanence of an established body of law governing
8 the relation, it perhaps may be doubted whether the
9 state could abolish all rights of action, on the one
10 hand, or all defenses, on the other, without setting up
11 something adequate in their stead. No such question
12 is here presented, and we intimate no opinion upon it.
13 The statute under consideration sets aside one body of
14 rules only to establish another system in its place. . . ."

15 In the instant case, any interpretation or construction barring
16 appellant's recovery against the United States (applying the exclusivity
17 provision of the F. E. C. A.) and against the fellow employee (applying
18 the Federal Drivers Act) violates due process for the plain reason that
19 no reasonably just equivalent is provided. See Richmond Screw Anchor
20 Co. v. United States, 275 U.S. 331, 72 L. ed 303, 48 S. Ct. 194 (1928).
21 The constitutional violation is particularly insidious where there is
22 attempt to abolish the judicial remedy in tort by implication.²

23 ²For purpose of this case, it is not necessary to consider whether or
24 not Congress would expressly enact legislation within the framework of
25 the F. E. C. A. abolishing the common law remedy against fellow employees
26 for the reason that it has not done so. In those states that have barred the
common law action against both fellow employees and employer, it was
accomplished by specifically expressed legislation in compensation statutes.
(continued on next page)

Concerning reference to the District Court decisions on the question presented, appellee ignores Green v. Short, Civil Action No. 1107 in and for the United States District Court for the Eastern District of Kentucky.³ The precise question was before the Court in Green. It held that the F. E. C. A. exclusive remedy provision was not a bar to a proceeding against the United States for negligence of the government driver in the course and scope of his employment. Of remarkable significance in Green is the fact that the appellee dismissed its appeal from a judgment in favor of plaintiff and satisfied his judgment of \$15,000.00. See Gilliam v. United States, 264 F. Supp. at 9.

In conclusion, the barring of judicial recovery to a government employee, made quadriplegic through the negligence of a fellow employee, is contrary to the purpose of the Federal Drivers Act which intended only to shift the financial responsibility from the negligent employee to the United States. Adoption of appellee's argument would nullify a traditional judicial remedy by implication, and it would make recovery depend upon the fortuitous circumstances of the type of accident involved. The optimal construction and interpretation - providing a reasonably just equivalent -

² continued:

See Allman v. Hanley, 302 F. 2d 588 (5th Cir. 1962). Appellee cites Silver v. Silver, 280 U. S. 117, 74 L. ed 221 (1929), but this opinion is not applicable because the constitutional review there was limited to the equal protection clause of the 14th Amendment and it involved the specifically expressed abolition of former rights.

³ An unpublished opinion set out in length in Gilliam v. United States, 264 F. Supp. 7 (E. D. Ky. 1967).

1 would allow recovery against the United States in tort (by not applying the
2 E. E. C. A.) while precluding recovery from the employee driver (by apply-
3 ing the Federal Drivers Act). Only this interpretation avoids an
4 incongruous, absurd and unjust result.

5 We respectfully urge that the judgment of the District Court in
6 favor of the appellee should be reversed.

7 Dated: San Francisco, California.

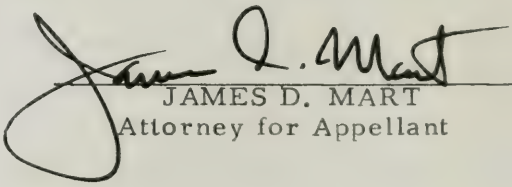
8 August 15, 1968

9 HOBERG, FINGER, BROWN & ABRAMSON

10 By JAMES D. MART,

11 Attorneys for Appellant.
12

13 I certify that, in connection with the preparation of this brief,
14 I have examined Rules 18, 19 and 39 of the United States Court of Appeals
15 for the Ninth Circuit, and that, in my opinion, the foregoing brief is in
16 full compliance with those rules.

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19 JAMES D. MART
20 Attorney for Appellant
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AFFIDAVIT OF SERVICE BY MAIL

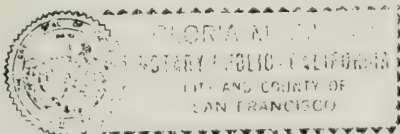
STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

MARY LINN being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of the City and County of San Francisco, and not a party to the within action. This affiant's business address is 703 Market Street, 18th floor, San Francisco, California. That affiant served a copy of the foregoing Brief by placing said copy in an envelope addressed to Morton Hollander and William Kanter, Appellate Section, Civil Division, Room 3706, U.S. Department of Justice, Washington 25, D. C. and Cecil F. Poole and Robert N. Ensign, 450 Golden Gate Avenue, San Francisco, California, which envelopes were then sealed and postage fully prepaid thereon, and thereafter was on August 16, 1968 deposited in the United States mail at San Francisco, California. That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

Mary Linn

Subscribed and sworn to before me
this 15th day of August, 1968

Gloria M. Rivard
Notary Public
in and for the City and County of San
Francisco, State of California
My commission expires March 15, 1970



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A P P E N D I X

United States Department of Justice

~~RNE:mg~~

UNITED STATES ATTORNEY

NORTHERN DISTRICT OF CALIFORNIA

16TH FLOOR FEDERAL BUILDING - BOX 36055

450 GOLDEN GATE AVENUE
SAN FRANCISCO 94102

May 16, 1967

RECEIVED
MAY 17 1967

Hodges, Finger, Brown and Harrison
By.....

Daniel J. McNamara, Esq.
Channell & McNamara
1626 Newell Avenue
Walnut Creek, California 94596

Re: Peter Anthony Noga v. United States
Civil No. 45558 (N.D. Calif.)

Dear Mr. McNamara:

We have discussed with the Attorney General's office your letter of April 27, 1967, demanding that the government take steps to remove the Superior Court action which you mention to the Federal District Court and substitute itself as a party defendant in place of Mr. Bruce.

Please be advised that the Attorney General will not certify that Mr. Bruce was acting within the scope of his employment at the time of the incident in question, and therefore no removal action will be taken.

You say in your letter that the government "has already accepted the fact that Mr. Noga and Mr. Bruce were both acting in the course and scope of their employment with the Federal Government." It is true, of course, that the Bureau of Employees' Compensation has determined that Mr. Noga was acting within the scope of his employment within the meaning of the FECA, but such determination does not settle the question of whether Mr. Bruce was acting within the scope of his employment within the meaning of the Tort Claims Act, as amended.

Very truly yours,

CECIL F. POOLE
United States Attorney

By: ROBERT N. ENSIGN
Assistant United States Attorney

May 22, 1967

United States Attorney
450 Golden Gate Avenue
San Francisco 94102

Attention: Robert H. Ensign
Assistant United States Attorney

Re: Peter Anthony Noga v. United States
Civil No. 45558 (N.D. Calif.)
RHE:mg

Gentlemen:

We wish to acknowledge receipt of Mr. Ensign's letter of May 16, 1967. We think the action of the Attorney General here completely overlooks the fact that there is already pending a suit against the United States under the Federal Tort Claims Act which Mr. Ensign is presently defending. By not removing the very same lawsuit against Mr. Bruce to the U.S. District Court where the same action is pending against the United States Government, the Attorney General is denying Mr. Bruce the protection to which he is entitled under the Federal statutes. As you know the lawsuit against Mr. Bruce is in the amount of a million dollars and this action of the Federal Government could result in great prejudice financially to Mr. Bruce in the event of a judgment against him in the state court. Certainly no harm would be done by the removal of the action to the U. S. District Court. Very probably it would result in Mr. Bruce personally being protected from the possibility of any large judgment against him. As you know, he only has a \$10,000.00 personal liability automobile policy.

It is therefore respectfully requested that the government reconsider this matter, and it is our obligation to remind you that we will hold the United States Government responsible for any detriment which may result to Mr. Bruce from the refusal of the Government to remove the suit now pending against Mr. Bruce from the California state Court to the U. S. District Court.

Very truly yours,

CHANNELL & McNAMARA

By

United States Attorney
May 22, 1967
Page 2

DJM:jh

cc: Department of Justice
Washington, D.C. 20530
Attn: John G. Laughlin, Chief
Torts Section, Civil Division
DJ Ref: 157-11-1460

Hoberg, Finger, Brown & Abramson
703 Market Street
San Francisco, California

June 12, 1967

United States Attorney
450 Golden Gate Avenue
San Francisco, California

Attention: Robert N. Ensign,
Assistant U.S. Attorney

Re: Noga v. U.S.
Noga v. Dennis Bruce

Gentlemen:

As you know, this office represents Peter Noga for the severe personal injuries which rendered him a quadriplegic as a result of an accident on August 24, 1964.

We join in Mr. McNamara's letter of May 22, 1967, requesting that the Government reconsider its position with regard to filing a certification of course and scope of employment of its employee, Dennis Bruce, and removing the State Court action to the Federal Court. Both Peter Noga and Dennis Bruce were employees of the Department of Agriculture, Forest Service Bureau, at the time of the instant accident. Extensive evidence was presented before the Bureau of Employees Compensation on the question of whether or not they were acting in the course and scope of their employment at the time of the accident. Copies of the evidence and the legal argument are enclosed herewith. The deposition of Dennis Bruce will also be made available upon request if you have not yet obtained it.

Clearly, California substantive law is governing on the question of course and scope of employment. The California courts have recognized numerous exceptions to the "going and coming" rule which would include the "bunkhouse" rule and the "peculiar risk" rule, both of which apply to the instant fact situation. Under the circumstances, the U.S. Attorney's office is required by 28 USC 2679 to file a certification and remove the case to the Federal Court. Any other course of action would be grossly unjust and deny both Mr. Noga and Mr. Bruce their rights under Federal statutes.

United States Attorney
Page 2
June 12, 1967

In the event that the further preparation of this case reveals any facts negating course and scope of employment we would of course consent to the remanding of the case to the State Court upon such a determination by the court. Under those circumstances there can be no prejudice to the U.S. Government.

I would also like to remind you of the fact that Judge Wollenberg currently has under submission the legal question with regard to whether or not the United States is subject to liability even though Peter Noga received compensation as a result of the Federal Drivers Act. We have requested the court to withhold its decision on the United States' motion for summary judgment until such time as the removal of the State action can be completed. Our request was made for the purpose of saving the court as well as the various parties involved considerable time and expense and afford the opportunity for an answer to all the legal questions with all the issues before the court. We therefore urge you to take the necessary steps to effectuate the removal of the case to the United States District Court at your earliest convenience.

If you need any further facts bearing on the question of course and scope of employment, kindly advise and we will do all in our power to cooperate.

Yours very truly,

JAMES D. MART

JDM:sa
Enclosure

cc Department of Justice
Washington, D.C. 20503
Attn: John G. Laughlin, Chief Torts Section,
Civil Division, DJ Ref: 157-11-1460

Channell & McNamara
1626 Newell Avenue
Walnut Creek, California

See Vol. 3464

No. 22,163

**United States Court of Appeals
For the Ninth Circuit**

JOHN BOYCE, an individual, and FMC
CORPORATION, a corporation,
Appellants and Cross-Appellees,

vs.

EARL R. ANDERSON, an individual, and
FILPER CORPORATION, a corporation,
Appellees and Cross-Appellants.

**BRIEF FOR APPELLEES
AND CROSS-APPELLANTS**

BOYKEN, MOHLER, FOSTER & SCHLEMMER

DIRKS B. FOSTER

HAROLD R. REGAN

44 Montgomery Street, Suite 2900,

San Francisco, California 94104,

*Attorneys for Appellees and
Cross-Appellants*

FILED

APR 30 1968

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United States Court of Appeals
For the Ninth Circuit

JOHN BOYCE, an individual, and FMC
CORPORATION, a corporation,
Appellants and Cross-Appellees,

VS.

EARL R. ANDERSON, an individual, and
FILPER CORPORATION, a corporation,
Appellees and Cross-Appellants.

BRIEF FOR APPELLEES
AND CROSS-APPELLANTS

This is an appeal from a judgment dismissing Appellants¹ complaint, which sought an order reversing the decision of the United States Patent Office Board of Patent Interferences in Interference No. 89,173 awarding priority of invention of a method of pitting peaches to Appellees.¹ The judgment was based on a conclusion that Plaintiffs placed the invention in issue in public use and on sale more than one year prior to the filing date of their application for Letters Patent and were, therefore, barred from receiving a patent under the provisions of 35 U.S.C. §102(b).

¹Hereinafter referred to as Plaintiffs; Appellees as Defendants.

JURISDICTION

Plaintiffs alleged jurisdiction in the Trial Court under 28 U.S.C. §1338 as an action arising under the patent laws of the United States, specifically 35 U.S.C. §146. Defendants contest such jurisdiction.

Jurisdiction of this Court on appeal is based on 28 U.S.C. §1291, in that the judgment entered by the District Court on July 12, 1967, was final. Notice of appeal was filed by Plaintiffs on July 26, 1967, and notice of cross-appeal was filed by Defendants on August 4, 1967.

STATEMENT OF THE CASE

Related to Jurisdiction

On March 7, 1962, the United States Patent Office Board of Interferences, in Interference No. 89,173 between the parties to this action, issued a decision awarding priority of invention of a method of pitting peaches to Defendant Anderson. (Exh. AS.²) The original complaint filed in the District Court on April 30, 1962, contained no allegations that an appeal had not been taken to the United States Court of Customs and Patent Appeals. (Vol. 1,³ pp. 1-4.) Defendants moved to dismiss that complaint on the ground of lack of jurisdiction, the Court granted the motion with leave to Plaintiffs to amend, and, on June 11, 1962, the first amended complaint was filed. (Vol. 1, p. 5.)

²Plaintiffs' exhibits begin with numbers, Defendants' with letters.

³Designated pleadings assembled in Vol. 1. Reporter's Transcript of Proceedings of Trial, originally numbered Vols. 1-7 renumbered Vols. 2-8 for this appeal.

Related to Public Use

As a result of Defendant Anderson filing in the United States Patent Office an application for Letters Patent on August 6, 1956, and Plaintiff Boyce filing an application for Letters Patent on June 10, 1957, both of which applications contained a claim (count) to a method of pitting peaches, Interference No. 89,173 was declared. Priority of invention of such claim was awarded by the Board of Interferences to Defendant Anderson. (Exh. AS.) Plaintiffs filed the action below seeking a reversal of such decision. (Vol. 1, pp. 4, 8.)

In an effort to establish they made the invention at an early date, Plaintiffs contended they completed such invention prior to August 8, 1955 (Vol. 2, p. 58), and successfully demonstrated it during the 1955 peach season (Exh. Y, p. 11, penultimate paragraph; Exh. AC). Plaintiffs' records also showed they demonstrated a "Model 300" peach pitting machine, which embodied and practiced the invention in issue (Vol. 2, pp. 73-74, 80-81, 131, 134-135; Vol. 3, pp. 131, 134-135), to a number of Plaintiffs' major customers, invited by Plaintiffs' sales manager (Vol. 2, p. 99; Vol. 4, pp. 225, 249-250, 271; Vol. 5, pp. 337-340, 410-411; Vol. 7, p. 560; Vol. 8, p. 678; Exh. AC; Exh. Y, p. 11; Exh. Z, pp. 18816, 18817), for the purpose of determining whether the appearance of the peaches pitted by such method was acceptable to the customers and how extensively the new pitting method might be used. (Vol. 5, pp. 371-372.)

Several cases of peaches pitted during the demonstration runs were canned, shown to customers for

sales promotion purposes (Vol. 2, p. 89; Vol. 3, p. 137; Vol. 5, pp. 366-367; Exh. AE; Exh. AE-1; Exh. AJ; Exh. AK; Exh. BP; Exh. BQ; Exh. BR; Exh. Z, pp. 18818-18824) and pictures of the same were employed in a color brochure advertising the existence and availability of the Model 300 peach pitter (Vol. 2, pp. 92-94; Vol. 3, pp. 124-125; Exh. AQ). Such brochures were distributed to the trade on or before June 5, 1956. (Vol. 2, pp. 92-94.) From October, 1955, through March, 1956, Plaintiff took "sales orders" on its regular printed forms for Model 300 peach pitters. (Vol. 3, pp. 117-118, 172-174; Exh. AB-1; Exh. AB-4; Exh. AB-6; Exh. AB-10; Exh. AB-13; Exh. AB-15; Exh. AB-19; Exh. AB-20; Exh. AB-21; Exh. AF; Exh. BJ-1; Exh. CE-1.) A number of such customers executed standard printed form leases for #300 pitters and Plaintiff FMC accepted such leases during the period from October, 1955 to before the "critical" date of June 10, 1956 (one year prior to the date of Plaintiffs' application for patent.) (Vol. 3, p. 184; Exh. AB-9; Exh. AB-12; Exh. AB-14; Exh. AB-18; Exh. AF; Exh. CF-4.)

In mid-January, 1956, Plaintiff undertook production of Model 300 peach pitting heads for its lease customers. (Exh. AG; Exh. AH; Exh. AI; Exh. AM.) During the peach season of 1956, several of Plaintiff's customers reported the tonnages of peaches pitted by their #300 machines in the usual manner, they were billed for the lease rentals, and the billings were entered in Plaintiff's, FMC's, books in the regular manner. Some of such rentals were actually paid

and such payments were entered in Plaintiff's, FMC's, books in the ordinary course of business. (Vol. 3, pp. 118-119; 176, 180, 181, 182, 184-185; Vol. 4, pp. 232-233, 236-239, 241-242, 243, 254, 257-258, 278, 285, 292; Vol. 7, pp. 564-566; Exh. AB-1; Exh. AB-4; Exh. AB-6; Exh. AB-10; Exh. AB-15; Exh. AB-20; Exh. AB-25; Exh. AT; Exh. BB; Exh. BD-1 to BD-8; Exh. BG; Exh. BL; Exh. BO; Exh. BS-2 to BS-7; Exh. BV; Exh. CA-1 to CA-3; Exh. CJ-5; Exh. CJ-6.)

Prior to the critical date of June 10, 1956, Plaintiff took orders for, executed leases with respect to and took steps to produce between 200 and 400 Model 300 machines. Such practice was inconsistent with Plaintiff's usual experimental practice of employing a special form of agreement with respect to machines which were intended to be placed on a trial or experimental basis. (Vol. 5, pp. 371-372; Vol. 6, pp. 533, 537.)

SPECIFICATION OF ERRORS

In connection with their cross-appeal on the issue of jurisdiction, Defendants specify the following errors:

1. The District Court erred in failing to grant Defendants' motion to dismiss this action on the ground that the original complaint was defective in not including sufficient allegations for jurisdiction.
2. The District Court erred in allowing Plaintiffs to file a first amended complaint after expiration of

the time for filing the complaint specified in 35 U.S.C. §146.

3. The District Court erred in allowing this action to proceed on the basis of Plaintiffs' first amended complaint.

SUPPORT FOR CHALLENGED FINDINGS

Appellant has challenged only Findings 38 and 40 the latter of which is an ultimate finding of fact based on a number of preceding findings. Therefore, under Rule 18 (3), Defendant specifies references to the record that support the findings as follows:

Finding 10. Plaintiffs contend they completed the invention in issue by August 8, 1955. (Vol. 2, p. 58.)

Findings 12 and 34. Plaintiffs' "Model 300" peach pitting machine or heads embodied and practiced the invention in issue. (Vol. 2, pp. 73-74, 80-81; Vol. 3, pp. 131, 134-135.)

Findings 13, 14 and 20. Plaintiffs' sales representatives demonstrated their Model 300 machine for groups of invited customers during the latter part of August and the first part of September, 1955, for the purpose, inter alia, of determining whether peaches pitted on such machine would be acceptable to the trade and how extensively the customers might utilize the method practiced by the machine. (Vol. 2, p. 99; Vol. 4, pp. 225, 249-250, 271; Vol. 5, pp. 337-340, 371-372, 410-411; Vol. 7, p. 560; Vol. 8, p. 678; Exh. Y, p. 11; Exh. Z, pp. 18816, 18817; Exh. AC.)

Findings 22 and 30. Sample peaches were pitted on the Model 300 machine, some were shown to Plaintiffs' customers, and some were shipped to them and charged to "sales promotion expense". (Vol. 2, p. 89; Vol. 3, p. 137; Vol. 5, pp. 366-367; Exh. Z, pp. 18818-18824; Exh. AE; Exh. AE-1; Exh. AJ; Exh. AK; Exh. BP; Exh. BQ; Exh. BR.)

Finding 23. Some of such sample peaches were pictured in a printed, color brochure advertising the Model 300 machine as currently available. Such brochures were distributed to Plaintiffs' customers for distribution to the trade on or about June 5, 1956. (Vol. 2, pp. 92-94; Vol. 3, pp. 124-125; Exh. AQ.)

Finding 24. Prior to 1955 Plaintiffs' normal practice in marketing peach pitting machines was to take sales orders from customers, accept lease agreements, require reports of rentals from and bill its customers for such rentals, all on standard printed forms. (Vol. 3, pp. 117-118, 172-174, 184.)

Finding 25. From October 24, 1955, through March, 1956, Plaintiffs issued sales orders on such printed forms for over 400 heads for use on their Model 300 machines. (Exh. AB-1; Exh. AB-4; Exh. AB-6; Exh. AB-10; Exh. AB-13; Exh. AB-15; Exh. AB-19; Exh. AB-20; Exh. AB-21; Exh. AF; Exh. BJ-1; Exh. CE-1.)

Finding 26. Between October, 1955, and June, 1956, Plaintiffs' customers executed standard printed form leases for the use of over 200 Model 300 machines during the 1956 peach pitting season, beginning

July 1, 1956, and Plaintiff FMC accepted the same. (Exh. AB-3; Exh. AB-5; Exh. AB-9; Exh. AB-12; Exh. AB-14; Exh. AB-18; Exh. AF-4; Exh. CF-4.)

Finding 28. In mid-January, 1956, Plaintiff undertook production of parts for Model 300 machines for installation prior to the 1956 peach pitting season. (Exh. AG; Exh. AH; Exh. AI; Exh. AM.)

Finding 35. Plaintiffs' purpose in demonstrating their Model 300 machine to customers, displaying such sample peaches, making changes in mechanical details of the machine, and preparing and publishing such advertising brochure was to solicit orders for such machine from their customers. (Vol. 5, pp. 371-372; Vol. 6, pp. 533, 537.)

Finding 38. At least 200 Model 300 machines were installed and operated in Plaintiff's customers' canning plants during the 1956 peach season, several of such customers reported the tonnage of peaches processed on such machines, were billed in due course for lease rentals, and some paid the rentals due to Plaintiff under such leases. (Vol. 3, pp. 118-119, 176, 180, 181, 182, 184-185; Vol. 4, pp. 232-233, 236-239, 241-242, 246, 254, 257-258, 278, 285, 292; Vol. 7, pp. 564-566; Exh. AB-1; Exh. AB-4; Exh. AB-6; Exh. AB-10; Exh. AB-15; Exh. AB-20; Exh. AB-25; Exh. AT; Exh. BB; Exh. BD-1 to BD-8; Exh. BG; Exh. BL; Exh. BO; Exh. BS-2 to BS-7; Exh. BV; Exh. CA-1 to CA-3; Exh. CJ-5; Exh. CJ-6.)

Finding 40. The large number of Model 300 machines and the number of lessees involved in Plain-

tiff's leasing program for the 1956 peach season, as well as the circumstances under which such machines were placed for use requires a finding that Plaintiff intended to and did commercially use such machines. (See above Findings Nos. 23, 24, 25, 26, 35 and 38.)

ARGUMENT JURISDICTION

The United States Patent Office Board of Interferences awarded priority of invention to Defendants after interference proceedings contested by Plaintiffs. (Exh. AS.) Fifty-four (54) days after the Board's decision, Plaintiffs filed a complaint in the District Court (Vol. 1, p. 1) for a civil action under 35 U.S.C. §146 which reads, in part:

Any party to an interference dissatisfied with the decision of the board of patent interferences on the question of priority, may have remedy by civil action, if commenced within such time after such decision, not less than sixty days, as the Commissioner appoints or as provided in section 141 of this title, unless he has appealed to the United States Court of Customs and Patent Appeals, and such appeal is pending or has been decided . . .

The complaint did not state whether Plaintiffs had appealed to the United States Court of Customs and Patent Appeals. (Vol. 1, pp. 1-4.)

At a hearing on June 5, 1962, ninety (90) days after the Board's decision, Defendants' Motion to

Dismiss the Complaint for lack of jurisdiction was granted by the District Court with leave for Plaintiffs to amend within ten (10) days.

On June 11, 1962, ninety-six (96) days after the Board's decision, Plaintiffs filed a First Amended Complaint, adding to the original complaint only the allegation that no previous appeal to the United States Court of Customs and Patent Appeals had been taken. (Vol. 1, pp. 5-8.)

Defendants' Renewed Motion to Dismiss the First Amended Complaint for lack of jurisdiction was denied by the District Court on June 20, 1962.

- A. The original complaint should have been dismissed without leave to amend, because it did not affirmatively state that appeal had not been taken to the United States Court of Customs and Patent Appeals.**

It is well settled that the federal courts are courts of limited jurisdiction, *Shamrock Oil & Gas Corporation v. Sheets*, 313 U.S. 100, 108-109, 61 S.Ct. 868 (1941), that statutes conferring jurisdiction are to be strictly construed, *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700 (1934), and that facts requisite to federal jurisdiction must affirmatively appear in the record, *Robertson v. Cease*, 97 U.S. 646, 648-650 (1878); *Ex parte Smith*, 94 U.S. 455, 456 (1876).

The principal authorities on the question of the specific jurisdictional requirements under 35 U.S.C. §146 (and its predecessor R.S. 4915) are: *Klumb v. Roach*, 151 F.2d 374 (7 Cir., 1945), cert. den. 327 U.S. 784, 66 S.Ct. 684 (1946); and *Union Carbide*

Corp. v. Traver Investments, Inc., 201 F. Supp. 763 (S.D. Ill., 1962), appeal withdrawn. In accordance with the above general rules of federal jurisdiction, the Seventh Circuit in the *Klumb* case stated:

“It must be remembered that this is not an ordinary equitable action but is predicated solely upon a statutory provision which confers jurisdiction upon the court and fixes the rights of the parties. In order for plaintiff to bring himself within the terms of §4915 and before the court can adjudicate the rights of the parties, certain things must exist: (1) Plaintiff must have elected to proceed in a District Court rather than by appeal to the United States Court of Customs and Patent Appeals; (2) his complaint must be filed within six months after the decision of the Patent Office; and (3) notice must be given to adverse parties and other due proceedings had. It is our view that these requirements are jurisdictional and the complaint by appropriate allegations must show that the requirements are met; otherwise, the court is without jurisdiction.”

151 F.2d at 377.

The peculiar relationship between the requirement (1), above, that the Plaintiff must allege facts showing its election and the requirement (2), that the suit must be commenced within sixty (60) days, makes this type of action unique. Tested on its face on the 60th day after the Board of Interferences decision, the complaint must meet all three jurisdictional requirements before a district court has the power to entertain the action.

Tested on that crucial day, the original complaint before the District Court here was defective as to requirement (1), above, because it failed to disclose whether an appeal had been taken to the Court of Customs and Patent Appeals. (Vol. 1, pp. 1-4.) It could not be affirmatively ascertained from that complaint that the District Court had requisite statutory jurisdiction. The Court below no more had the power to permit amendment to cure that defect than did the court in the *Union Carbide* case, *supra*, to permit amendment to cure a defect as to the requirement (3) there involved. *Shell Development Co. v. Universal Oil Products Co.*, 63 F.Supp. 476 (D. Del., 1945) *aff'd*. 157 F.2d 421 (3 Cir., 1946.)

B. Granting of leave to amend the original complaint and the filing of the First Amended Complaint both occurred outside the 60-day period for filing a complaint.

Since the District Court had no jurisdiction to entertain the original complaint or to grant leave to amend that complaint, the filing of a First Amended Complaint [Plaintiffs' first attempt to comply with requirement (1)] 96 days after the decision complained of is defective as to the 60-day requirement (2). The 60-day period was established by the Commissioner of Patents in accordance with the statute (37 C.F.R. §1.304). No power is given the District Court to either waive this requirement or extend the period under the guise of leave to amend a complaint. *Ferwerda v. Coakwell*, 121 F.Supp. 334 (N.D. Ohio, 1953); *aff'd*. 220 F.2d 752 (6 Cir., 1955); *Ferwerda v. Bendix Aviation Corp.*, 136 F.Supp. 620 (D.N.J., 1955.)

There is no question among the courts that a complaint not filed within the prescribed period is defective. The only significant question is whether the defect is jurisdictional, in which case it cannot be waived even if not pleaded, or whether the defect is one of limitation, which is waived unless pleaded by the defendant.

If this Court feels, as did the courts in *Grady v. Watson*, 261 F.2d 752 (D.C. Cir., 1958); and *Radio Corporation of America v. International Standard Electric Corporation*, 134 F.Supp. 593, 594 (D.Del., 1955), that the defect is jurisdictional, then the Trial Court erred in granting Plaintiff leave to amend its complaint at a time outside the sixty- (60-) day period and in accepting Plaintiff's Amended Complaint as a basis for this action, for the Trial Court did not have jurisdiction to do either.

If this Court feels, as did the courts in *Eckey v. Watson*, 268 F.2d 891 (D.C. Cir., 1959); and *Diva Laboratorium Aktiengesellschaft v. De Loney & Co.*, 237 F.Supp. 868 (D.D.C., 1965), that the sixty- (60-) day period is a limitation which can be waived unless timely raised, the result is the same, upon Defendants' renewed motion, the Trial Court should have dismissed the First Amended Complaint.

It is clear from *Eckey* that only the Commissioner of Patents can extend the 60-day period on a petition timely filed and in the present case such extension has neither been requested nor granted. The Trial Court erred in usurping the Commissioner's adminis-

trative powers and, in effect, granting Plaintiffs a judicial extension of the 60-day period by granting Plaintiffs leave to amend their complaint and by accepting Plaintiffs' First Amended Complaint.

PUBLIC USE

35 U.S.C. §102 provides, in pertinent part:

"A person shall be entitled to a patent unless—
(b) The invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . ."

This statute bars the Plaintiffs from obtaining the claim in suit because of their commercial exploitation of the claimed method prior to the "critical date" of *June 10, 1956*.

"The express purpose of this statutory provision was to prevent the extension of the monopoly period permitted by the patent laws by requiring an inventor to make timely application so that the patent period might commence to run without undue delay."

Cataphote Corporation v. DeSoto Chemical Coatings, Inc., 356 F.2d 24, 25, mod., 358 F.2d 732 (9 Cir., 1966), cert. den., 385 U.S. 832 (1966).

Contemporaneous documents kept by Plaintiffs show that they placed the invention in issue in public use and on sale, in violation of the statute, by engag-

ing in various sales promotion activities prior to their critical date.

A. Plaintiffs' demonstrations of its #300 machine to customers for the purpose of inducing sales constituted public use.

Prior to September 7, 1955, Plaintiffs' sales manager invited a number of Plaintiffs' major customers to view a demonstration of their new Model 300 peach pitter. The machine was demonstrated, and samples of peaches pitted according to the method invention in issue were displayed to groups of the invited canners. The demonstrations were calculated to yield optimum results and several customers were impressed. The purposes of the demonstrations were to determine whether the pitted peach appearance was acceptable to the customers and how extensively the new pitting method might be used. (Vol. 1, p. 99; Vol. 4, pp. 225-228, 249-252, 271, 274; Vol. 5, pp. 337-340, 366, 371-372, 410-411; Vol. 6, pp. 536-537; Vol. 7, p. 560; Vol. 8, p. 678; Exh. Z, pp. 18815-18817.)

Such demonstrations and displays resulted in placing the invention in issue in public use and on sale. *Nicholson v. Carl W. Mullis Engineering & Manufacturing Co.*, 315 F.2d 532, 535 (4 Cir., 1963); *Armour & Co. v. The Rath Packing Co.*, 154 F.Supp. 54, 57 (N.D. Ill., 1957); *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 235 F.Supp. 936, 938 (N.D. Cal., 1964); *Tucker Aluminum Products, Inc. v. Grossman*, 312 F.2d 293, 295 (9 Cir., 1963); *Philco Corp. v. Admiral Corp.*, 199 F.Supp. 797, 814-817 (D.Del., 1961).

B. Plaintiffs' use of sample peaches for sales promotion purposes and advertising of the machine is significant evidence of public use.

Several cases of peaches pitted on the Model 300 machine during the demonstration runs were canned, some were shown to canners as further evidence of the improved results obtainable by the #300 machine, and others were shipped to canners by Plaintiff and charged to "sales promotion expense". (Vol. 2, p. 86; Vol. 3, p. 137; Vol. 5, pp. 366-367; Exh. Z, pp. 18818-18824; Exhs. AE, AE-1, BP, BQ, BR.)

Commercial exploitation of the product (sample peaches) of a process or method is public use of the method. *Metallizing Engineering Co., Inc. v. Kenyon Bearing & Auto Parts Co., Inc.*, 153 F.2d 516, 519 (2 Cir., 1946) (and cases cited therein), cert. den. 328 U.S. 840 (1946), pet. for reh. den. 328 U.S. 881 (1946); *Tool Research & Engineering Corp. v. Honcor Corp.*, 367 F.2d 449, 453-454 (9 Cir., 1966), cert. den., 387 U.S. 919, pet. for reh. den., 88 S.Ct. 17 (1967); *Armour & Co.*, 154 F.Supp. at 57.

Pictures of the sample peaches appeared in a printed, color brochure advertising "a new pitting machine . . . the FMC peach pitter Model 300" which "FMC now offers" and "is available". A considerable number of such brochures were distributed to Plaintiffs' customers on June 5, 1956, for distribution to their trade. (Vol. 2, pp. 92-94; Vol. 3, pp. 124-125; Exh. AQ.)

Such advertising is significant evidence of public use and on sale under 35 U.S.C. §102(b). *Cataphote*

II, 235 F.Supp. at 938; *Nicholson*, 315 F.2d at 534-535; *Tucker*, 312 F.2d at 295 (where "are available" was used in the plaintiff's advertisement).

C. The sales orders for #300 machines were at least offers to lease or sell machines for performing the method, which constitutes "on sale" under the statute.

From about October 24, 1955, through March, 1956, Plaintiff took "sales orders" on its standard printed forms for over 400 Model 300 peach pitters from ten customers. (Exhs. AB-1, AB-4, AB-6, AB-10, AB-13, AB-15, AB-19, AB-20, AB-21, AC, AD, AF, BJ-1, CE-1.)

Especially when added to the factors of demonstrations, use of pitted peaches and advertising to prospective customers, the taking of orders is sufficient to call into play 35 U.S.C. §102(b). *Piet, et al. v. United States*, 176 F.Supp. 576 (S.D. Cal., 1959); *Philco*, 199 F.Supp. at 815; *Armour Research Foundation v. C. K. Williams & Co.*, 280 F.2d 499 (7 Cir., 1960), cert. den. 365 U.S. 811 (1961), pet. for reh. den. 366 U.S. 941 (1961). The law is invoked even though the machines were not to be delivered until after the critical date. *Philco*, 199 F.Supp. at 814-815; *Tucker*, 312 F.2d at 295; *Nicholson*, 315 F.2d at 534.

D. The execution and acceptance of leases of #300 machines were sales of the invention under the statute.

From October, 1955, to June, 1956 (before the critical date), at least seven of Plaintiff's customers executed standard printed form leases for #300 pitters and such leases were accepted by Plaintiff. (Exhs. AB-3, AB-5, AB-9, AB-12, AB-14, AB-18, CF-4.)

The "sales orders" may be construed as contracts of sale, but there is no question that the leases executed in response thereto were actual sales under Plaintiff's customary program of leasing peach pitting equipment with an option to purchase. *Cataphote II*, 235 F.Supp. at 937-939; *Tucker*, 312 F.2d at 295; *Nicholson*, 315 F.2d at 535.

E. Production of machines in anticipation of plaintiffs' customers' requirements and related activities are consistent with commercial use.

In mid-January, 1956, Plaintiff undertook production of sufficient #300 heads to meet its commitments. During February and March, 1956, a Model 300 machine was operated in Australia and Plaintiff's sales representatives were instructed to display such sample peaches to lessees of the machines. (Exhs. AG, AH, AI, AJ, AK, AL.)

These activities, occurring prior to the critical date, are consistent with commercial use as opposed to the alleged "experimental" use. *Philco*, 199 F.Supp. at 817; *Nicholson*, 315 F.2d at 535; *Cataphote II*, 235 F.Supp. at 940.

F. The reporting, billing, and paying of rentals under the leases of #300 machines is consistent with commercial use.

Several of Plaintiff's customers reported the tonnages of peaches pitted by their #300 machines (as required under their leases), were billed for the lease rentals, and the billings entered on ledger cards (standard forms customarily used for this purpose by Plaintiff). Some lessees actually paid the rentals

due and such payments were entered in Plaintiff's books in the customary manner. (Vol. 3, pp. 118-119, 175-176, 178, 180, 182, 184-185; Vol. 4, pp. 241-242, 292; Exhs. AB-25, AT, BB, BD-1 to BD-8, BG, BL, BO, BS-2 to BS-7, BV, CA-1 to CA-3.)

These factors are consistent with a program of sales promotion and sales carried out in the usual commercial manner. *Cataphote II*, 235 F.Supp. at 939.

"The nature of a sale of this character cannot be *changed* by the seller after the purchase." (Emphasis in original.)

Piet, 176 F.Supp. at 582.

"Rather these factors are consistent with a program of market testing, product introduction, and sales promotion that is consistent with a stage of product development well beyond the experimental."

Cataphote III, 356 F.2d at 27.

G. Plaintiffs' intent and purpose, as shown by their activities, was to commercialize their Model 300 machine.

Plaintiffs attempt to justify their delay of nearly two years from completion and successful demonstration of their invention in August, 1955, to the filing of their application in June, 1957, on the basis that they were "experimenting" with the invention. It is not Plaintiffs' *claim* that should be considered, but the actual circumstances which manifested intent. *Philco*, 199 F.Supp. at 817; *Elizabeth v. Pavement Company*, 97 U.S. 126, 133 (1877).

The purpose of the demonstrations to canners, the display of sample peaches, hectic operations in Australia, the preparation and publication of the advertising brochure—essentially all the acts that Plaintiffs now claim were “experimental”—was to *sell* the #300 machine. “Well, you certainly couldn’t sell the screw-driver and hammer method, . . .”, elaborated Plaintiffs’ Vice President in charge of the #300 machine project (Vol. 6, p. 520). The findings of the Lower Court bear out the conclusions that the demonstrations appear “typical of ‘a trader’s, and not an inventor’s, experiment’”, *Cataphote III*, 356 F.2d 27.

The facts that the alleged inventor of the method in suit, Mr. Boyce, had nothing to do with the demonstrations (Vol. 2, p. 83) and that Plaintiffs’ contemporaneous documents referred “not to experimentation, but to ‘demonstrations’” (as in Exh. Z, pp. 18815, 18816) are further evidence of commercial purposes. *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 235 F.Supp. 931, 934 (N.D. Cal., 1964); *Cataphote II*, 235 F.Supp. at 939.

Further evidence of Plaintiffs’ actual intent and purpose may be found in the lack of records of canners’ comments useful in perfecting the invention, *Armour Research*, 280 F.2d at 506, and that the demonstrations were conducted by the *sales* department, *Philco*, 199 F.Supp. 815-817.

Whether the demonstrations and advertising disclosed the details of the Model 300 machine or the demonstrations were made under some alleged security arrangements (of which there is no record) is

immaterial. *Elizabeth*, 97 U.S. at 136; *Chun King Sales v. Oriental Foods*, 136 F.Supp. 659, 662 (S.D. Cal., 1955), rev'd on other grounds; *Oriental Foods v. Chun King Sales*, 244 F.2d 909 (9 Cir., 1957); *Metalizing*, 153 F.2d at 517.

H. The scale of plaintiffs' activities with respect to the #300 machines prior to June 10, 1956, requires the finding of public use.

The mere size of Plaintiffs' leasing program for the 1956 season destroys any suggestion that it was intended to be experimental (although one witness said: "That's the way they turned out." (Vol. 6, p. 556.)

Although, as Plaintiff concedes, a single instance of public use or on sale is fatal, Plaintiff offered the Model 300 machine to most of its major customers, without any attempt at selection for "experimental" reasons, and to fill their entire plant requirements for peach pitters. (Vol. 4, pp. 260-261; Vol. 5, pp. 404, 410; Vol. 7, pp. 572, 582; Vol. 8, p. 678.) On the basis of those of Plaintiff's records which were produced during Defendants' discovery and the testimony of representatives of Plaintiff's customers, Defendants have conservatively estimated the number of Model 300 machines in operation during the 1956 season at six of Plaintiff's customers' plants at 201 (see chart in Appendix); the number of tons of peaches pitted on such machines during the 1956 season at 34,215; and the total rental income lost to Plaintiff (including rentals refunded for both the #300 and the knife pit-

ters) at \$210,832.49. If Bercut-Richards rentals were refunded, as Plaintiff claims, the total lost is \$266,291.99. Some experiment!

Not only are the findings of fact which support the conclusion that Plaintiffs placed the invention in public use and on sale more than one year before their filing date not clearly erroneous, they are supported by clear and convincing evidence, largely from Plaintiffs' own records.

I. There is no authority contrary to the holding of public use.

The only case relied on by Plaintiffs on this issue is *Amerio Contact Plate Freezers, Inc. v. Belt-Ice Corporation*, 316 F.2d 459 (9 Cir., 1963), where the Lower Court's holding, based on two crucial findings, was affirmed:

1. A "mock-up", not capable of freezing foods and two full-scale machines, both incomplete and inoperative, were constructed before the critical date; and,
2. No definite offer to buy or sell the machine was made until after the critical date when a purchase order was executed. (316 F.2d at 460-463.)

The inapplicability of that case is obvious when compared with the facts here:

1. A full-scale #300 machine successfully pitted peaches at the 1955 demonstrations for Plaintiffs' customers. The samples pitted on the machine were used to promote sales of the machine. Plaintiffs admitted the demonstrated machine embodied and practiced the invention (Vol. 2, pp. 73-74); and,

2. Sales orders and leases on regular commercial forms containing definite terms were executed before the critical date.

The *Amerio* case is further distinguishable when the fact that Plaintiffs were not engaged in “eliciting needed changes in design” of their method invention (or their machine) during the demonstrations to customers is compared with that quotation of purpose from *Amerio*. (316 F.2d at 465.)

Although the facts here are likewise distinguishable from those in *Elizabeth*, the law of that case applies:

“But if the inventor allows his machine to be used by other persons, generally, either with or without compensation, or if it is, with his consent, put on sale for such use, then it will be in public use and on public sale, within the meaning of the law.” (97 U.S. at 135.)

OTHER ISSUES

The Trial Court properly disposed of the case on the public use issue.

In addition to public use, there were other issues in the action below, such as whether John Boyce was the true sole inventor on Plaintiffs’ application and whether Plaintiffs had priority of invention as between the parties. No evidence was admitted on these other issues in view of an Order of the District Court, dated March 28, 1966 (Vol. 1, p. 108), that all proof of both parties on the issue of public use should be submitted before submission of proof on any other issues. Such order was made in response to Defend-

ants' motion under F.R.C.P. 42(b) for a separate trial of the issue of public use.

Having determined the issue of public use in Defendants' favor and adverse to Plaintiffs, the District Court properly held the action disposed of and ripe for entry of its final judgment. The holding that Plaintiffs placed their invention in public use and on sale more than a year prior to the filing date of their application bars the District Court from awarding any affirmative relief to Plaintiffs. *Sanford v. Kepner*, 344 U.S. 13, 15, 73 S.Ct. 75 (1952); *Turchan v. Bailey Meter Co.*, 167 F.Supp. 58, 63 (D. Del., 1958).

Plaintiffs' attempt to twist the meaning of *Sanford II* to their purpose of requesting a ruling on the validity of Defendants' patent in the guise of determining the issue of "priority". There is no evidence that Defendants have ever threatened Plaintiffs and the parties are in agreement "that the Anderson patent is not actually in use". (Vol. 6, p. 504.) Under these circumstances Plaintiffs have no right to a determination of validity of Defendants' patent because there is no controversy respecting the same. *Sanford v. Kepner*, 195 F.2d 387, 390 (3 Cir., 1952). Nor are Plaintiffs in any position to assert the "public interest" in this action where they have lost their right to a patent on the invention in issue. *Sperry Rand Corp. v. Bell Telephone Laboratories, Inc.*, 317 F.2d 491, 493 (2 Cir., 1963).

It is at least unseemly of Plaintiffs to engage in name-calling, especially when the Trial Court did not

intend the expression "dog in the manger" in any derogatory sense. (Vol. 6, p. 509.) It seems, rather, that Plaintiffs' attitude is: If we can't have a patent because of our public use, Defendants shouldn't have a patent either. Not only is there no proposition of law supporting such attitude, but *Sanford II* (cited by Plaintiffs) is directly opposed to such proposition. That case decided that the plaintiff, who had lost his right to a patent on the priority issue, had *no right* to an adjudication of the validity of the defendant's patent. Plaintiffs have lost their right to a patent on the public use issue, therefore, they have no right to an adjudication of the "validity" of Defendants' patent.

Even if the Trial Court had discretion to terminate the trial after the public use issue, such discretion was properly exercised. *Cataphote III*, 356 F.2d at 27, note 5.

It is extremely doubtful that Plaintiffs would prevail on the question of priority (notwithstanding their erroneous conclusion that Defendants have conceded or would not oppose the same) in view of their overwhelming burden of proof to overcome the Patent Office decision. *Morgan v. Daniels*, 153 U.S. 120, 124, 14 S.Ct. 772 (1893). Furthermore, this action is a poor vehicle in which to test the validity of Defendants' patent, *Cleveland Trust Company v. Berry*, 99 F.2d 517, 521, 522 (6 Cir., 1938), and would be contrary to the direction of the Supreme Court in *Sanford II*, 344 U.S. at 15-16.

CONCLUSION

Appellees-Cross-Appellants' position is that the District Court was without jurisdiction to try this action and should have dismissed the complaint on that ground.

Alternatively, if the Trial Court had jurisdiction, Plaintiffs' own records clearly sustain the finding that they intended to place and did place their machine embodying the invention in issue in public use and on sale more than one year before the filing date of their application for Letters Patent. The law is clear that such action bars them from receiving a patent, the only relief sought in this action.

Plaintiffs' complaint regarding the introduction of unspecified portions of some depositions is deemed unworthy of response and, at most, may constitute harmless error under F.R.C.P. 61.

Disposition of the action below on the public use issue was according to law and the Judgment of the District Court should be affirmed.

Dated, San Francisco, California,
April 26, 1968.

Respectfully submitted,
BOYKEN, MOHLER, FOSTER & SCHLEMMER
DIRKS B. FOSTER
HAROLD R. REGAN

*Attorneys for Appellees and
Cross-Appellants*

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DIRKS B. FOSTER

*Attorney for Appellees and
Cross-Appellants*

(Appendix Follows)

Appendix

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

COE KANE,

Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

✓
No. 22,168

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

FILED

FEB 1 1968

WM. B. LUCK, CLERK



FEB 2 1968

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

COE KANE,

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UNITED STATES OF AMERICA,

Appellee.

No. 22,168

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.

JURISDICTIONAL STATEMENT OF FACTS

On December 16, 1966, the Federal Grand Jury sitting at Tucson, Arizona, returned an Indictment charging Appellant Coe Kane, an Indian, with having wilfully, unlawfully, feloniously, deliberately, premeditatedly, and with malice aforethought, killed and murdered Ethel W. Kane on or about November 26, 1966, on the Fort Apache Indian Reservation in the District of Arizona. (Transcript of Record, Volume I,

Item 1.) (Hereinafter, Appellant will be referred to as "Coe Kane"; Volume I of the Transcript of Record will be referred to as "RC"; the Reporter's Transcript of the hearing on Appellant's Motion to Suppress will be referred to as "S RT," the number following will refer to the page, and the numbers following "L" will refer to the line; the three volumes of the Reporter's Transcript of the testimony at trial will be referred to as "RT," the number following will refer to the page.)

On December 19, 1966, Coe Kane was brought up for arraignment, and requested counsel, Leonard Karp was appointed, and the arraignment was continued. (RC Item 30) On December 27, 1966, Robert Hirsh, retained counsel, was substituted for Leonard Karp, and Coe Kane pleaded not guilty (RT Item 30). On December 30, 1966, Coe Kane's Motion to Set Bail was heard and bail was set at \$5,000 with \$500 in cash to be deposited and trial was set for May 3, 1967 (RC Item 30). On January 3, 1967, Coe Kane was admitted to bail (RC Item 30).

On January 12, 1967, the Government filed a Motion to Continue Trial in order to comply with the provisions of 18 U.S.C.A., §3432 since the new jury panel would not report until May 2, 1967, one day before trial (RC Item 4).

On January 23, 1967, the Motion was granted and trial was reset for May 11, 1967 (RC Item 30).

On May 4, 1967, the Government filed a Motion for Appointment of Expert Witness pursuant to Rule 28, Federal Rules of Criminal Procedure, Title 18 U.S.C.A. (RC Item 5).

On May 8, 1967, the Court granted the Motion and appointed Dr. Marshal Jones and gave instructions to the expert (RC Items 6 & 7).

On May 9, 1967, Coe Kane filed a Motion to Suppress (RC Item 8).

On May 10, 1967, the Motion was heard, testimony and exhibits were received and the Motion was denied (RC Item 11 and 30).

On May 10, 1967, a stipulation between Coe Kane and the Government was filed to the effect that Coe Kane is an enrolled member of the White Mountain Apache Tribe of Indians; that Ethel Kane was an enrolled member of the Hualapai Tribe of Indians; and that the events with which the trial was concerned occurred within the boundaries of the Fort Apache Indian Reservation in the District of Arizona (RC Item 10).

On May 11, 12, 16 and 17, 1967, trial was held before the United States District Judge James A. Walsh and the jury returned a verdict of guilty of voluntary manslaughter on May 18, 1967 (RC Item 30 and 16).

On May 12, 1967, the Court appointed Dr. Hugh Estes as its expert and filed instructions to the expert (RC Items 12 and 13).

On June 5, 1967, the Court entered Judgment of guilty and sentenced Coe Kane to ten years (RC Item 19).

On June 5, 1967, Coe Kane lodged a Notice of Appeal and moved for appointment of counsel and for admission to bail which was granted (RC Items 20, 21, 22 and 26).

On June 12, 1967, application for Order for transcript on appeal was filed by Coe Kane and on June 13, 1967, the affidavit of Coe Kane was filed and a motion for appeal in forma pauperis was filed (RC Items 23 & 24).

On June 13, 1967, the Court entered an Order Granting Leave to Appeal in Forma Pauperis and the Notice of Appeal was filed (RC Items 25 and 26).

This is an appeal from a Judgment entered by the United States District Court for the District of Arizona. This Court has jurisdiction of this appeal by the provisions of 28 U.S.C.A., §1291.

II.

STATEMENT OF FACTS

On the Saturday following Thanksgiving of 1966, that is on November 26, 1966, two young boys from Kentucky, two cousins by the name of Louis Luttrell and his younger cousin Jimmy Lee Luttrell were outside Globe, Arizona, hitchhiking back to Kentucky (RT 100-101; 280). A man they recognized as the defendant, Coe Kane, gave them a ride in his vehicle at around 4:00 or 5:00 p.m. (RT 102; 284). Jimmy Luttrell got in the front seat and Louis Luttrell got in the back seat (RT 102). Jimmy Luttrell smelled what smelled to him like beer on the breath of Coe Kane (RT 102-103). The smell was not strong when they were picked up (RT 103). They wanted to get up to Highway 66 and Coe Kane offered to take them part of the way that night, that he would let them sleep in his car at home, that his home was off the Highway 60 that leads up to Highway 66, but that in the morning he would take them on north to Show Low and drop them off so they could continue on their way by Highway 66 (RT 109; 305). During the ride they talked (RT 110); Coe Kane talked about the war and stated he could get along with everybody except his wife (RT 110 L 9-19; 284 L 7). Coe Kane was driving pretty fast (RT 103 L 21-22). When they went down into the Salt River Canyon, a road that winds down the mountain to the bottom of the canyon and then winds its way up, Coe Kane was driving at a pretty fast rate, fifty or sixty; he went over the double line; at times the cousins did ask him to slow down (RT 103 L 23-25).

As Jimmy Luttrell described, if Coe Kane hadn't driven that highway before and wasn't familiar with it, Coe Kane would have missed some of those curves because he, Jimmy, sure didn't see them (RT 104-105). When they were almost out of the canyon, the oil light went on (RT 106 L 5-8). Coe Kane told them they were going to have to get some oil be-

cause his car was leaking oil pretty bad (RT 106). Coe Kane told them he had a friend that lived up the road from whom he could get oil (RT 106). Jimmy and Louis Luttrell went with him (RT 106-107). Coe Kane walked at a fast rate (RT 106-107). Coe kept saying, "It's just a little ways further, it's just a little ways further." Jimmy and Louis Luttrell estimated they walked from one to two miles to the home (RT 107). They waited outside; Coe came out with the friend who also appeared to be an Indian, and the friend gave them a lift back to the parked car; they put oil in the car and the friend followed them as far as the turn-off for his house on the highway (RT 107). They then proceeded to the junction off of Highway 60 which leads to the Ft. Apache Indian Reservation and also leads to White River, and also leads to the home of Coe Kane at Canyon Day (RT 108). At this junction Coe Kane stopped the car at a service station and put some oil in the car and came back into the car with a six pack of beer, stubbies (RT 109). Jimmy and Louis Luttrell recalled that Coe Kane did not drink at all until they reached that service station; that once they left the service station, Coe Kane offered them a beer each and Coe himself had two bottles of beer, so there were two stubby beers left in the six pack (RT 109; 282-283). They arrived home, Coe Kane's house at Canyon Day, and they remained in the car while Coe Kane went inside (RT 110 L 24 to 111 L 13). Coe Kane came back and took the groceries out, took a rifle out of the car and handed it to his wife, Ethel, and Ethel took the rifle by the case and it started falling to the ground. Coe Kane caught it before it hit the ground and handed it back to her (RT 111; 245). Coe Kane and his wife went inside. After approximately five minutes they came back out and invited Louie and Jimmy Luttrell into the house (RT 111). They all went into the living room (RT 111). Ethel Kane, Coe's wife, picked up the baby off the couch, one of their children, and she and Coe Kane went into the bedroom (RT 285); Jimmy and Louie Luttrell

sat on the couch (RT 285). They could hear talking in there, but not loud voices, not angry voices (RT 111-112). Either before she went into the bedroom with her husband or when they entered the house, Ethel said, "I don't like to be around him when he's drinking." (RT 286 L 19-20) To Louis Luttrell Coe Kane appeared less intoxicated when they arrived at his home (RT 299 L 18-25). Louis Luttrell described both Coe Kane's and Ethel Kane's temperment as flat and meant by that they did not raise their voices (RT 308). (However, Coe Kane did raise his voice in an angry tone when he asked her to bring the beer back (RT 308 L 14-16).) Ethel Kane came out and picked up the remainder of the six pack, the two remaining stubbies, and started out the door. She got as far as the front door and had it open (RT 288) when her husband said, "Where are you going?" she said, "I'll be back." "Where are you going with my beer? Come back or I'll shoot you," (RT 129; 288) and she turned around, walked toward him and told him, "You wouldn't." (RT 288 Louis Luttrell saw Coe Kane pick up a rifle, a heavy rifle; Louis Luttrell is not sure if he levered it. Kane threw it back down by the washing machine and picked up another rifle that had a telescopic lens on it. Government's Exhibit 2, raised it, levered it and aimed it and shot her in the side of the head. That happened in a matter of seconds. Ethel Kane fell to the floor (RT 288-289). Both Louie and Jimmy Luttrell went through that front door which Ethel had left open, ran about a quarter of a mile to a place called Miracle Church where a meeting or service was going on (RT 113-114; 290). Outside the church selling pop from the back of a pick-up was a little young Apache girl about fifteen or sixteen named Ruloh Nosie, whom they asked for help (RT 62). Ruloh went in and told her father, Carl (RT 63). Carl Nosie got up and told others in the congregation and they came outside (RT 68-69). There were lots of cars there from the meeting, and the only car that wasn't caught or blocked by others was Billy Kane's, a

cousin of Coe's (RT 69), so they asked Billy to drive them (RT 69). Jimmy Riley and Carl Nosie rushed to Coe Kane's house (RT 70). Billy Kane left Jimmy Riley and Carl Nosie off while he parked the car; Carl and Jimmy ran around to the kitchen door and they knocked (RT 70). There was no answer. Soon they saw Coe Kane's face at the window, and he said, "It's locked," and he gestured toward the front door (RT 71). Carl Nosie and Jimmy Riley entered, and they found Ethel Kane on the floor with blood coming out of her nose and Coe Kane crying over her. Riley told Kane to move and Coe Kane did (RT 147). Jimmy Riley felt for signs of life and there were no signs of life (RT 72). Carl Nosie saw two rifles in the room and took them to Billy Kane who locked them in the trunk (RT 73). Billy Kane came in and heard Coe Kane saying, "Ethel" and "Baby" (RT 170). Billy Kane left to notify relatives (RT 170). Jimmy Riley had left to go to the closest phone to summon help (RT 150). Riley called police and an ambulance (RT 149-150). Carl Nosie could not smell alcohol on Coe Kane's breath (RT 78) nor did his eyes appear glassy (RT 83). Two tribal policemen, Ed Kahn and Lafe Altaha arrived (RT 75; 182). They went in and Lafe Altaha felt for signs of life (RT 183). They secured the premises (RT 184) after they had placed Coe Kane in the police car, but nothing was said to him (RT 77; 183).

Floyd Chestnut, who is a Bureau of Indian Affairs employee, a criminal investigator, was on a stake-out at the high school that night (RT 217). It took approximately one hour for Chestnut to get there (RT 217 L 15). When he arrived he took pictures (RT 218). Her body was taken by Hupp Sanchez, an employee of the Public Health Hospital at White River, to the Public Health Hospital (RT 214-215). Chestnut looked for bullet holes and cartridge shells, but did not find any (RT 237).

Carl Nosie had Billy Kane open the trunk, and they took the two rifles and they handed them to Ed Kahn who handed

them to Floyd Chestnut (RT 222). Both rifles, Government's Exhibits 1 and 2, were empty (RT 223). Government's Exhibit 1 operates with a clip by bolt action, with Government's Exhibit 2 the ammunition is hand-loaded and is loaded by lever-action (RT 222-223). Grady received Government's Exhibit 1 from Francis Dazen at the police station (RT 275). Floyd Chestnut gave one rifle, Government's Exhibit 2, to Henry Grady (RT 224).

The Government offered the testimony of Dr. Thomas Jarvis, a medical doctor practicing in Globe and St. Johns, who testified that a bullet entered Ethel Kane's head on the left side just above the ear, the parieto-occipital area. The bullet disintegrated on entering the brain; it never exited (RT 48-49). Fragments of the bullet were removed (RT 51). The bullet fractured the skull into three pieces (RT 49). She died almost instantly, in all probability (RT 50).

Coe Kane offered evidence of reputation for being a peaceful and law-abiding person by the following persons who had never heard anything bad: William Glidden (RT 320); James Stevens (RT 325); Wayne Kirkpatrick (RT 329); Rev. Arthur Genther (RT 337); Raymond Kane (RT 566).

There was further evidence of reputation for being a peaceful and law-abiding person by people who had heard these traits of Coe Kane discussed. They were as follows: Father Sylvester Manchester (RT 244), but he had not heard Coe Kane had been arrested for simple assault in October of 1966 (RT 247-248); Ronnie Lupe (RT 252), but Lupe had not heard Coe Kane had been arrested for simple assault in October of 1966 (RT 252), nor had he heard Coe Kane had been arrested for assault and battery in March of 1962 (RT 254); Fred Benashley (RT 259), nor had he heard of the two said arrests (RT 260); Max Taylor (RT 332), nor had he heard of the two said arrests (RT 332-333).

Coe Kane also offered the testimony of four psychiatrists, three of whom, Dr. William Cutts (RT 362-397), Dr. Hu-

bert Estes (RT 465-490), Dr. Marshall Jones (RT 505-532), testified Coe Kane had a pathological reaction to alcohol and the fourth psychiatrist, Dr. L. Willard Shankel, who did not so testify but testified instead that Coe Kane was suffering from a chronic undifferentiated schizophrenic disorder and that Coe Kane was incapable of knowing and understanding what he was doing on November 26, 1966 (RT 536). Dr. Shankel based this diagnosis on Coe Kane's statement to him that he could not remember the shooting (RT 535), and that he had visual and auditory hallucinations during periods of excessive drinking (RT 537-538).

Dr. Cutts based his opinion that Coe Kane did not know the nature and quality of his act (RT 368) on Coe Kane's stating he was unable to recall the period of the shooting (RT 368 L 10-15) and other periods of black-outs Coe Kane said he had (RT 374 L 12-18).

Dr. Cutts related what was told him by Coe Kane as to head injuries three different times, in 1954, in 1960 and in May or June of 1966 (RT 373 L 10-23).

Dr. Cutts had no absolute way to determine if the history Coe Kane related was false except his own opinion that Kane was truthful (RT 380 L 11-17).

Dr. Cutts stated the memory defect must be consistent (RT 382 L 18-21).

Dr. Cutts stated his opinion would be changed if, in the observation of others Coe Kane was crying over his wife and had sent his daughter to summon help (RT 392 L 22 to 393 L 14).

Dr. Cutts testified the consumption of alcohol was the precipitating cause of Coe Kane's not being able to understand the nature and quality of his acts (RT 396 L 24 to 397 L 1).

Dr. Estes testified that there is no objective method to establish whether or not a person is having a pathological reaction to alcohol (RT 469 L 14-20).

Dr. Estes was of the opinion that Coe Kane had a pathological reaction to alcohol and did not know the nature and quality of his acts in picking up the rifle and shooting his wife (RT 472-473).

Dr. Jones testified that but for the alcohol he would not have shot his wife (RT 511 L 3-4).

Dr. Jones did not believe hallucinating was a part of Coe Kane's reaction to alcohol (RT 525 L 9-11).

Dr. Jones' opinion was based on the change in his driving and the reputation for being a peaceful person (RT 529).

Raymond Kane testified for Coe Kane and stated that Coe Kane was his father's first cousin and that he was friendly with him (RT 563 L 7-11). He testified also that he drove Coe Kane's brother and mother to Coe's home that night (RT 564). They went in and saw the body; Raymond Kane came out and walked over to the police van and quoted Coe as saying, "Hey, what am I doing in here. Let me out of here." He stated he repeated it four or five times (RT 564 L 21-23).

Coe Kane testified that on Saturday, November 26, 1966, he and his wife arose early, as they were both going to work. She was a practical nurse at the Public Health Hospital at Whiteriver and he was a heavy equipment operator for the Bureau of Indian Affairs. They first drove by his place of work and no one was there. He then drove her to the hospital. She told him that if he wasn't working that day to drive to Globe to pick up shoes that had been repaired and pictures that had been developed. He had wanted to wait until payday which was on Friday. She wanted him to go on Saturday because she was afraid the pictures would be lost, which had happened to them before (RT 342-344). Coe went on to a friend's house. It was about 6:45 a.m. At approximately 10:00 a.m. he left for Globe and arrived a little after 12:00 noon (RT 345). He picked up the shoes and then picked up the pictures and groceries (RT 345). Coe then went to pick up

hamburgers to eat and decided to have some beer at Pinky's on the way out of town. This was at approximately 1:00 p.m. (RT 346 L 16-17).

He told his wife he would be home by 4:00 p.m. (RT 346 L 4-5). When this conversation took place, he did not state (RT 346 L 2-5).

At Pinky's, Coe ran into a friend, Eddy Edwards, and the friend insisted on having a beer (RT 347). After the second pitcher of beer Coe Kane testified he did not recall what happened (RT 348). He testified "blackouts" had happened to him on previous occasions when he was having a beer or something (RT 348 L 13-19).

Coe came to while walking "to this man's house, we were out of oil." He did not remember leaving Globe or picking up the hitchhikers (RT 348 L 22-25).

He did remember a little before that about being in the Salt River Canyon and one of the boys said the light was going on. Coe looked around and saw someone was in the car and was surprised to find two people in the car (RT 349).

Coe recalls stopping at Carrizo Junction for some beer and drinking one beer but does not remember drinking a second one (RT 350). He did recall a conversation about the Army and was never in the Army (RT 350).

He did not remember his way home "from Cedar Creek on out where I had—they said I had the second beer, I don't remember that until I pulled right in front of the house, you know, right against the house." (RT 350 L 23-25).

Coe Kane met his wife by the door and he stated his wife asked who they were; he replied they were hitchhikers and she told him the rifles were in the car with the hitchhikers. He replied one was in the bedroom and she said, no they were both in the car (RT 351).

Coe testified he had left only one in the house because he was in a hurry and he had not checked it to see if it was loaded

(RT 352). After a leading question and an objection to it, Kane stated it was the .22 caliber, Government's Exhibit 2, he had left in the house (RT 352 L 12-15).

Coe stated the .22 caliber, Government's Exhibit 2, was last used by him on Thanksgiving day and was unloaded, and that the .308 magnum, Government's Exhibit 1, had a loaded clip, but the gun was not loaded. (RT 352-353)

Coe stated he and his wife went outside and obtained something; he did not remember what (RT 354). Once inside the house he remembered showing her the .22 rifle in the closet and told her the hitchhikers had asked to stay in the car overnight (RT 355). He does not remember the hitchhikers coming in. (RT 355 L 1-3) All he remembers is showing her the .22 rifle, presumably Government's Exhibit 2, in the closet in the bedroom and walking into the living room with it in his hands (RT 355).

He did not remember pulling the trigger and had no intention to shoot his wife (RT 356).

He did recall telling his little girl to go get help (RT 356 L 21 to 356 L 7).

He did recall that he was in the dog catcher (RT 357) and talking to Charles Malone in jail the next morning (RT 358) but he did not recall talking to Billy Kane while in the dog catcher (RT 358).

He did not start drinking in Pinky's for any particular purpose except that he ran into a friend (RT 359).

He had no intention of harming Ethel (RT 359).

Coe Kane had drunk in the past and realized he had blackouts (RT 360). Before 1960, he did not have blackouts. (RT 360 L 19-21) In 1960 he had an accident when he was roping and went over his horse head first (RT 361).

On cross-examination he was asked if he told Dr. Cutts whether he got along well with his wife after the birth of his third child which was in 1960, and he replied he had. (RT

399 L 9-11) They did have some arguments, but only once in a while. (RT 399 L 12-14)

Before placing the next question, Government's counsel asked to approach the bench and stated the next question would relate to an argument in 1965 about Coe Kane's going around with another woman and why didn't he let her go to her mother's home with the children to let him go around with the woman. (RT 400-401) Appellant's counsel objected and then conceded that it would constitute pertinent cross examination unless asked in bad faith (RT 401 L 7-10).

The question was put to Coe Kane as to any time in 1965 (RT 403-404) and he did not remember it (RT 404 L 2-3).

He was asked if he told anyone about getting dizzy and he replied only his wife and his parents (RT 407 L 2-11).

He was asked when the dizzy spells started and he replied in 1960 (RT 407). He was asked if he told Dr. Jones that the dizzy spells started in the last eighteen months and he replied he had (RT 407-408).

He was asked what time did he go back to the hospital on November 26, 1966, after he had dropped his wife off and he replied 10 or 10:30 (RT 411). He was asked what time did he arrive in Globe and he replied he didn't know (RT 411 L 17-18). He was asked if he told Mr. Hirsh (Appellant's counsel) 12:00, and he replied he had, but that he didn't really know the time, he was just guessing (RT 411).

He was asked how fast was he driving, and he replied 60 miles per hour on the straight stretches, and as fast as he could on the curves (RT 412).

He was asked what he did in Globe and he related shopping and going for a hamburger (RT 413). He was asked at what time he went for a hamburger and he replied he didn't remember (RT 414, L 1-2). He was asked if he told Mr. Hirsh around 1:00 p.m. and he replied it could have been and on hearing the question repeated he replied he had (RT 414 L 3-6).

He was asked if Pinky's, the place he had said on direct examination, was on the way home, i.e., Show Low (RT 346 L 16-17) and he said it was and then admitted it was not (RT 414-415).

He was asked what time he arrived at Pinky's and he replied 1:30 or 2:00 (RT 415 L 24 to 416 L 1). He was asked if it was as late as 3:00 or 4:00 and he replied it couldn't have been. (RT 416 L 2-3).

He stated he could have had a second glass before his friend Edwards arrived (RT 416).

He was asked if he told any doctor at Whiteriver about his blackouts or dizziness and he replied he hadn't. (RT 417 L 23-25)

He was asked if he went to the doctors for sinus trouble and eye trouble and he "couldn't say." (RT 418-419)

He was asked if he first bought his friend a glass of beer and then a pitcher of beer and he couldn't recall (RT 421). He was asked if he had three glasses out of the first pitcher and he couldn't recall (RT 422).

He was asked if he told Mr. Hirsh on direct examination that the hitchhikers had told him he had two beers in the car and he couldn't recall (RT 423-424).

He was asked where he remembered "coming to" on his trip home and he replied at the bridge at the bottom of the Salt River Canyon (RT 428-429).

He could not recall he had told Mr. Hirsh on direct examination that he "came to" walking to the house. (RT 432 L 4-9)

He could have told Henry Grady on November 28, 1966, he had two beers on his way home, but someone in the jail could have told him that (RT 491-492).

He could not recall calling his wife at the hospital long distance from Globe (RT 492 L 7-12). He could not recall if during this phone call he had an argument with her (RT 495 L 1-4).

He didn't tell anyone at the hospital about the blackout when he had his accident in the summer of 1966 because he was more concerned about his swollen arm (RT 495-496).

He did not know why he took the .308 rifle to Globe (RT 496 L 23-25), and he didn't know why he left the .22 rifle at home (RT 497 L 1-11).

On re-direct examination he denied ever checking the .308 on November 26 to see if it was loaded (RT 499 L 10-13).

On re-cross examination he calls going for sinus trouble treatment but did not tell the doctor about blackouts because he never did give much thought to it (RT 504 L 6-12).

Dr. Gilbert M. Burkel was called for rebuttal by the Government; he was the Medical Officer in Charge of the United States Public Health Hospital at Whiteriver (RT 549-550). He stated he has custody of the medical records and how they are prepared and maintained (RT 550-551). He stated that in July, 1966, Coe Kane was treated following a rodeo accident for a swollen arm and this was the only injury found; he was released (RT 551). In March 1966 he was treated for recurrent sinusitis (RT 551 L 22-24). He was treated repeatedly for sinus trouble and eye infection in 1966 and 1965 (RT 552), and those were the only things he was treated for during that time (RT 552).

Dr. Burkel also testified he knew Ethel Kane, the decedent. On November 26, 1966, he recalled she received a long distance call from Globe about 12:15 to 1:00 p.m. (RT 552 L 13-22). The phone conversation lasted approximately five minutes (RT 553 L 4-5). She raised her voice and appeared upset by the call (RT 553 L 6-22).

On cross-examination, it was brought out he was hospitalized in August 1960 for rodeo injuries, including a possible brain concussion, but when he was discharged the concussion was not diagnosed (RT 554). He remembered the time of the phone call because he was late for lunch and he was fin-

ishing some notes at the nurses' station when the call came (RT 558 L 13-16).

On re-direct, Dr. Burkel testified he was at the hospital when Ethel Kane's body was brought in the evening of November 26, 1966, and he had a conversaiton with a nurse concerning the phone call and that is what impressed it on his memory (RT 561 L 16-23).

Gladys Whatoname was also called on rebuttal for the Government. She stated she was the mother of the decedent (RT 572 L 19-20).

She testified that in 1965 she was riding with her daughter and son-in-law, Coe Kane. She stated Ethel Kane stated she wanted to go live with her mother so that Coe could go around with his lady friend and she wanted Coe to let her take the children (RT 574-576).

On cross-examination she stated she knew who the woman was Ethel was talking about (RT 576).

Edward Edwards was also called on rebuttal for the Government. He testified he went to Pinky's about 4:00 p.m. (RT 579 L 16-18). He saw Coe Kane there (RT 579 L 8-10). Pinky's is south of Globe on the way to the San Carlos Reservation, not the Fort Apache Reservation (RT 579 L 11-15).

First Edwards bought a glass of beer for Coe Kane, then Edwards got his wife out of the car (RT 580). Then three pitchers of beer were bought (RT 581). They were there about an hour (RT 586 L 6-8).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Trial Court properly denied a Motion for Judgment of Acquittal at the close of all the evidence because the Government did sustain its burden of proof of sanity of the Appellant at the time of the Commission of the offense.

2. The Trial Court did permit Appellant's counsel (Trial Counsel) to ask if the jurors would be willing to accept lack of mental responsibility through insanity or some other mental defect as a defense (RT 27 L 17-23) and the Court properly denied Appellant's Counsel (Trial Counsel) to voir dire the jury on insanity brought on by the drinking of intoxicating beverages.

3. The Trial Court properly denied Appellant's Motion to Suppress Exhibit 6 which was a photograph of the victim's covered body; Exhibit 8 which was a photograph of the victim's covered body from the kitchen; Exhibit 12 which was a photograph of the victim's covered body from the living room; and any evidence emanating from the seizure and autopsy of the body of the deceased, Ethel Kane.

4. The Trial Court did not err in refusing to exclude evidence that there was a clip in the .308 rifle, Government's Exhibit 1 at 10:00 p.m.

5. The Trial Court properly denied Appellant's Counsel (Trial Counsel) offer of proof as follows: "My question would be if he has *an opinion* as to Kane's reputation for truth and veracity; then depending on the answer, whether he would believe him under oath. And the reason I would propound these questions, I don't think they are admissible until such time as the credibility of the defendant has been attacked and in the light of what the witness has testified it now becomes a credible matter." (RT 567 L 11-17, emphasis supplied.)

6. The Trial Court did not err in failing to give defendant's requested instruction numbered 14 as having been covered insofar as it was proper.

7. The Trial Court did not err in failing to give defendant's requested instruction numbered 28.

8. The Trial Court did not err in refusing to exclude evidence offered through the decedent's mother as to a conversation when at the time of the foundation question to Appellant, Coe Kane, Appellant's Counsel (Trial Counsel) conceded it was pertinent cross examination. (RT 401,L 7-10)

9. The Trial Court did not err in not sustaining the objections to the question put to Appellant on the grounds of "... no foundation; number two, if the answer is yes, it is irrelevant, not adding to any issue in this case, evidence of some prior bad act by the defendant, is inadmissible, a prejudicial question. I would suggest there is insufficient proof, even if this were answered—."

10. The Trial Court did not err in not allowing Appellant's Counsel (Trial Counsel) to ask character witnesses for the defense as to "alleged numerous arrests" being made on the Fort Apache Indian Reservation.

IV.

SUMMARY OF ARGUMENT

1. There was sufficient evidence upon which the sanity of the Appellant at the time of the commission of the offense could be found beyond a reasonable doubt.

2. The voir dire of the jurors was not unduly restricted by the Trial Court.

3. The entry into the premises did not constitute an unreasonable entry.

4. There was a sufficient showing of a chain of custody to show the .308 rifle, Government's Exhibit 1, was unloaded when Floyd Chestnut received it.

5. Reputation evidence as to truth and veracity must be based on the knowledge of the witness not the opinion.

6. Defendant's requested instruction number 14 was covered insofar as it was proper by the Court's instruction.

7. Defendant's requested instruction number 28 was covered insofar as it was proper by the Court's instruction.

8. The foundation question to Appellant and the witness supplying the question put to Appellant by decedent was properly admitted.

9. The alleged "numerous arrests" of other Indians on the reservation was properly excluded.

V. ARGUMENT

1. There was sufficient evidence upon which the sanity of the Appellant at the time of the commission of the offense could be found beyond a reasonable doubt.

Appellant argues that

"(T)he record in this case shows that the defendant produced four qualified psychiatrists that testified that defendant was legally insane at the time of the commission of the crime charged. In addition to the foregoing there was lay testimony that the defendant acted in a strange and unusual manner sometime before the commission of the crime charged and sometime thereafter."

As is set out in the Statement of Facts herein, one of the psychiatrists, Dr. Shankel testified that Coe Kane was suffering from a chronic undifferentiated schizophrenic disorder and that Coe Kane was incapable of knowing and understanding what he was doing on November 26, 1966. (RT 536) Dr. Shankel based this diagnosis on Coe Kane's statement to him that he could not remember the shooting (RT 535) and that he had visual and auditory hallucinations during periods of excessive drinking. (RT 537-538)

Dr. Jones testified that he did not believe hallucinating was part of Coe Kane's reaction to alcohol (RT 525, L 9-11). Drs. Cutts and Estes did not mention any hallucinating by Coe Kane (RT 362-398 and 465-490). Dr. Estes did not believe him to be schizophrenic (RT 482, L 2).

Drs. Jones (RT 509), Cutts (RT 368) and Estes (RT 472-473) all testified that in their opinion Coe Kane was suffering from a pathological reaction to alcohol at the time of the offense and did not understand the nature or the quality or both the nature and quality of his act.

All four psychiatrists based their opinion on what Coe Kane related to each of them and that in their opinion Coe Kane was truthful (Dr. Cutts, RT 374 L 21-23; Dr. Estes, RT 486-487; Dr. Jones, RT 51 L 13-16; Dr. Shankel, RT 534 L 15-18).

It is interesting to note that the one different diagnosis was by the psychiatrist who saw him first: Dr. Shankel on April 24, 1967 (RT 534, L 10-11); Dr. Cutts on May 1, 1967 (RT 364, L 7-11); Dr. Jones on May 10, 1967 (RT 507, L 9-10); Dr. Estes on May 13, 1967 (RT 470, L 17-22).

Dr. Cutts stated his opinion would be different if prior to his crying period as observed by others he said that he had told his daughter to go summon help (RT 393, L 3-14). (Please see testimony of Coe Kane where he did just that, RT 356, L 21 to 356, L 7.)

The cross-examination revealed that Coe Kane did not recall statements made on direct examination (Please see Statement of Facts for example (RT 411, 414 and 432). If he were faced with a statement made by him as to events he now stated he could not recall, he would say these facts were told to him in jail before he was taken to the U. S. Commissioner (RT 491-492). Who these people were who told him things he could not remember, and yet Floyd Chestnut (RT 41, L 16-24 and RT 449), Henry Grady (RT 262, L 11-16), Lafe Altaba (RT 183, L 1-12), Edgar Kahn (RT 197, L 1-12), the investigating officers, and Carl Nosie (RT 71-75), Jimmy Riley (RT 147-151), and Hupp Sanchez (RT 214, L 2) did not talk to him, and Billy Kane (RT 177, L 1-21) and Raymond Kane (RT 569, L 20 to 565, L 2) related his questions and they made replies they could not help him.

The Luttrell cousins did not see him from the time of the shooting until trial (please see their entire testimony, RT 100-141 and 279-311).

The jury did not find Coe Kane to be a credible witness. Appellant's counsel characterizes the testimony of the lay wit-

nesses saying that Coe Kane was acting strangely. Without repeating the entire testimony of the Luttrell cousins, the Tribal Police officers Lafe Altaha and Edgar Kahn, Carl Nosie, Jimmy Riley, Billy Kane and Raymond Kane, it is respectfully submitted that they did not describe his actions as strange. The Luttrell cousins described him as happy, Carl Nosie felt sorry for him and didn't try to talk to him, etc.

It is respectfully submitted that the only behavior that can be characterized as "strange" was Coe Kane's asking what he was doing in the wagon (see testimony of Billy Kane RT 177 and Raymond Kane RT 564-565).

The Tribal Police officers were the first on the scene. They were well trained, it is respectfully submitted. If they told Coe Kane he was under arrest, their actions could have been interpreted as the tribal court taking jurisdiction and thus have ousted the Federal Court from jurisdiction. Floyd Chestnut, the only Federal Officer, didn't arrive until approximately an hour later since he was on a stake-out at the high school and they couldn't reach him (RT 217). So it was quite natural that Coe Kane should ask why was he in the paddy wagon.

The witnesses who stated they knew his reputation for being a peaceful and law abiding person did not appear to know that much about his reputation.

As was stated in *Michelson v. United States* (1948) 335 U.S. 469 at page 479:

"... It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. Thus, while the law gives defendant the option to show as a fact that his reputation reflects a life and habit incompatible with commission of the offense charged, it subjects his proof to tests of credibility designed to prevent him from profiting by a mere parade of partisans."

The Government offered Government's Exhibit 17 for Identification, out of hearing of the jury as proof of its good faith (RT 590).

The Court cautioned the jury and Appellant's counsel (Trial Counsel) as follows, at the time the first questions were asked:

"THE COURT: No, that wouldn't have anything to do with it. The only — let me explain to you, counsel, this question that the Government is permitted to ask is only to test the witness' knowledge of his reputation. The witness says that he knew his reputation for peace and quietude and this is asked to test that reputation. That's the only purpose of it, so the number of times other people got arrested in White River would be immaterial.

"MR. HIRSH: Well, could I request the Court to instruct the jury as to what the Court stated, that this is to be considered not substantively?

"THE COURT: I think I said that. It's for the purpose of testing the witness' statements that he did know his reputation. Then he's asked if he has ever heard this." (RT 248, L 23 to 249 L 11)

As was stated in *Gallion v. United States* (9th Cir., 1967) F.2d at page in a trial in which the Court sat as the finder of fact: (At the time of the writing of this brief *Gallion* was not published, but it is Ninth Circuit Number 21, 479, dated November 30, 1967, at the last page of the slip sheet opinion)

"The district judge was not bound by the opinion of the doctor. *Mims v. United States*, 375 F.2d 135, 140 (5th Cir. 1967); *Holm v. United States*, 325 F.2d 44 (9th Cir. 1963). There is no showing that the district judge arbitrarily ignored the expert testimony. His opinion shows that he considered the expert testimony together with all the other facts in the case."

As was stated in *Mims v. United States* (5th Cir., 1967) 375 F.2d 135 at page 140-141:

"We agree with the appellant's statement of the general rule governing the burden of proof on the sanity issue in federal criminal cases. The sanity of the accused is always an element of the offense charged; and the presumption of sanity, standing in the place of evidence when no question is raised about the issue, takes care of the prosecution's burden of proving sanity. But when evidence of insanity is received, regardless of the source, that presumption disappears, and the prosecution has the burden of proving the mental capacity of the accused beyond a reasonable doubt.¹ However, no case has been cited to us, and we have found none, laying down the arbitrary rule that an accused is entitled to a judgment of acquittal merely because he offers expert opinion evidence on the issue of his insanity and the prosecution attempts to rebut it without expert witnesses. On the other hand, one of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of the *credibility* and *weight* of expert opinion testimony are for the trier of facts, and that such testimony is ordinarily not conclusive even where it is uncontradicted.² The Supreme Court of the United States has said that the trier of the facts is not limited to a compromise and balancing of opinions of expert witnesses in reaching its decisions,³ and that there is no rule of law that requires the judgment of witnesses to be substituted for that of the jury.⁴"

As was stated in *Buatte v. United States* (9th Cir., 1964) 330 F.2d 342 at page 344:

"This account of the testimony relating to defendant's insanity is sufficient to disclose *that the evidence on that point was substantial and reasonably impressive.*" (Emphasis added)

It is respectfully submitted that the evidence of insanity was not substantial and definitely not impressive.

Furthermore, Coe Kane knew of these blackouts. The three psychiatrists who stated Coe Kane was suffering from a pathological reaction stated but for the alcohol, Coe Kane would not have had what they believed he had. See Dr. Cutts

at RT 396-397, Dr. Estes RT 468, and Dr. Jones RT 511. Further, Dr. Shankel also expressed it as the precipitating cause of his psychotic state (RT 545, L 21-25)

The Court instructed on voluntary intoxication as follows:

"No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose of intent is a necessary element to constitute any particular species or degree of crime, such as, for instance, the first degree murder in this case or the intent to kill must exist, whenever the actual existence of such an intent is a necessary element to constitute the offense, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose or intent with which he committed the act.

"If and when the proof shows that the defendant unlawfully killed a human being, and if the evidence also shows that at the time of the mortal assault the defendant was intoxicated, the jury is permitted and ought to consider such evidence of intoxication for the purpose of determining the intent with which the act was done.

"Although intoxication or drunkenness alone is not a defense, the fact that a person may have been intoxicated at the time of the commission of the crime may negative the existence of specific intent. Accordingly, evidence that a defendant acted while in a state of intoxication is to be considered in determining whether or not the defendant acted with the specific intent charged in the Indictment.

"If the jury has a reasonable doubt from the evidence in the case whether because of the degree of his intoxication the mind of the accused was capable of forming or did form the specific intent required to commit an offense included in the Indictment, the jury should acquit the accused as to such an offense." (RT 621, L 14 to 622, L 18)

This instruction, combined with the instruction as to specific intent (RT 623, L 7 to 624, L 6), as well as the instruction on the elements of the offenses included in the Indictment, i.e., murder in the first degree, murder in the second degree, and voluntary manslaughter (RT 609, L 21 to 618, L 22) meets the test of *Rivers v. United States* (9th Cir., 1966) 368 F.2d 362 at pages 363-364.

It is respectfully submitted that there was sufficient evidence to find Coe Kane sane at the time of the commission of the offense.

2. The voir dire of the jurors was not unduly restricted by the Trial Court.

(It should be noted, although circumstantial evidence of it only appears in the record that the Government's counsel prior to trial informed the Court and Appellant's counsel (Trial Counsel) that it was specifically not going to seek the death penalty. The jury was not asked these questions on voir dire, and the Government's counsel told the jury specifically that at the end of the Opening Statement, RT 39, L 5-8.)

The voir dire of the prospective jurors by the Court covered thirteen pages of transcript (RT 5-18) and is too lengthy to set out here.

Among all the questions asked, the Court did ask as follows:

"It may be that in this case—and I try to cover all events at all times in these instructions, I am not predicting anything that will happen because that will depend on the evidence presented, but there may be raised in this case the question of the mental competency of the defendant, Mr. Kane, on the 26th day of November, at the time that the acts are alleged to have been committed by him according to the Indictment. Now, if that should happen, if that issue should arise, then the Court would give you instructions as to the law governing the sanity. Among other things the Court would tell you that the Govern-

ment had the burden of proving the sanity of the defendant at that time. If the issue comes up, the Court would tell you also what the Government would be required to do in order to establish the elements of sanity in the case. Now, if that should happen and the jury is instructed to that issue, is there anyone who would have any difficulty in the case accepting the law regarding the burden of proof as to sanity, the definition of sanity and when sanity is legally established? If the Court should give you those instructions in the trial of this case, is there anyone who would have any difficulty in accepting those principles of law any more than you would any other principle that the Court might give you in the instructions?" (RT 17, L 10 to 18, L 7)

Appellant's Counsel (Trial Counsel) then asserts the following soliloquy was an undue restriction on voir dire:

"MR. HIRSH: Anybody else who has some experience or training in this, special knowledge? Have any of you had any medical training, particularly training in neurology? Have any of you had any training in sociology or psychiatry? Are there any of you that might have any ideas that would indicate or would cause you to believe that psychiatry isn't a valid science or you don't feel that there is any merit to psychiatry? The Court advised you that, of course, the Government has the burden of proving any element of the offense charged beyond a reasonable doubt. One of the elements, I might point out, that there has to be an intent to kill or —

"THE COURT: Mr. Hirsh.

"MR. HIRSH: This is prefatory.

"THE COURT: I am going to instruct the jury. You may well be way off in what I instruct them.

"MR. HIRSH: Well, my question would be, Your Honor, —

"THE COURT: Don't tell them what the elements are because the Court will do that; and, if you get off into

something that isn't proper the Court isn't going to instruct them as to that, so don't attempt to instruct the jury as to the law.

"MR. HIRSH: May I — perhaps I could approach the bench and advise the Court what my question would be.

"(Discussion at the bench out of the hearing of the jury, as follows:)

"MR. HIRSH: I'd like to make a record on it. My feeling is this: My defense obviously is that there is a lack of intent by virtue of no mental responsibility by insanity, and I feel that I have to voir dire the jury.

"THE COURT: I asked them about the fact that they will follow the Court's instruction as to insanity and what constitutes proof of insanity, and don't go into instructing what the law is or what the Court is going to tell them the law is, because that's the Court's job.

"MR. HIRSH: I am trying to stay away from it. My first question: If any of you had a reasonable doubt as to whether the defendant intended to kill, would you be willing to —

"THE COURT: That's improper.

"MR. HIRSH: If I can make a record. Let me finish, then the Court can overrule. —Would you be willing to acquit him notwithstanding the fact that there was or might be evidence that the defendant might have pulled the trigger that inflicted the fatal flaw?

"THE COURT: The Court objects to that. There will be an instruction, and I will instruct you not to ask that question.

"MR. HIRSH: That's one of the defenses that may be interposed by the defendant, was a lack of mental responsibility through insanity or some other mental defect. —Are there any of you who might be willing to accept that as a valid defense?

"THE COURT: I have asked it in another way, but you may ask that if you want.

"MR. HIRSH: If there were reasonable doubt as to the sanity of the defendant at the time the offense was committed, would you then be willing to acquit the defendant?

"THE COURT: The Court is going to instruct them as to that. We may not get insanity in here.

"MR. HIRSH: Would you follow the law as to insanity if you were so instructed by the Court, if you knew that the insanity was brought on by the drinking of intoxicants?

"THE COURT: Short of delirium tremens, it couldn't be—can't be. If it's something that was brought about by voluntary intoxication, and it's a lack of—unless it did, it isn't a defense.

"MR. HIRSH: You would not allow me to ask this question?

"THE COURT: That's right.

"MR. HIRSH: The defendant may or may not testify in this case, and if he does testify, would you be willing to judge his testimony by the same rules?

"THE COURT: Go ahead with that.

"MR. HIRSH: Can you decide the case on the evidence and the law and set aside any emotional reaction that you might have in the case? And that would be the extent of it.

"THE COURT: All right." (RT 25, L 21 to 28, L 20)

At page 28 of the Appellant's Opening Brief, Appellant states at the end of the first full paragraph that,

"... it is just as logical to permit a searching of the witnesses' feelings towards defense of insanity *and the prospective testimony of psychiatrists.*"

It is respectfully submitted no restriction on psychiatrists was made. He asked a question as to psychiatrists in the fourth question at the beginning of the preceding quotation (RT 25, L 25 to 26, L 3).

One would have to assert that the Trial Court in its mind was restricting Appellant's Counsel (Trial Counsel) from going into people's opinion of psychiatry because surely the record does not so disclose.

It is respectfully submitted the Trial Court exercised its sound discretion in ruling as it did, and the scope of voir dire rests in the sound discretion of the Trial Court. *Johnson v. United States* (9th Cir., 1959) 270 F.2d 721 at page 724, cert. den. 362 US 937, 4 L.Ed. 2d 751, 80 S. Ct. 759.

3. The entry into the premises did not constitute an unreasonable entry.

The Trial Court at the hearing of the Motion to Suppress stated and found as follows:

"THE COURT: No, we are not. We are going to have circumstances like these where the police get an emergency call, which, as the officer said, meant a shooting or stabbing, and he went to investigate; he came to the premises, the door was open, as he was going to step in he could see a body and, 'I, on seeing the body, I came further in,' and there he found the lady on the floor, Mr. Kane weeping over her; that Mr. Kane makes no statement, Mr. Kane says nothing. Mr. Kane doesn't give any explanation as to what happened. It's his house, his wife. They finally get him off the body and check for signs of life; it's determined that she is dead, it's determined that she died a violent death. There is no weapon at hand, so suicide would not be readily in the picture. She is there with a wound in the middle of her head which is evidently caused or believed to be through the nose and she dies and Mr. Kane is there for ten or fifteen or twenty minutes and he says not one word about, 'I found her this way.' 'She fell in the bathroom,' or anything. He just says nothing, and he is there with the body of his dead wife who has died a violent death. And I would say it's very clear that the officer had reasonable grounds to believe—that a reasonably prudent person would believe that a felony had been committed,

that this lady had died a violent death; and further, from the circumstances, he there weeping, offering no explanation, they had reasonable cause to believe that he had connection with it, whether it was involuntary manslaughter, an accidental thing or whether it was voluntary manslaughter, or whether it was murder, they knew that a felony had been committed and had reasonable cause to believe that he had committed it. So the arrest was lawful in my findings." (S RT 48, L 12 to 49, L 16)

It is respectfully submitted that Appellant in his opening brief on page 31-32 overlooks the findings of the Trial Court that the entry was reasonable and that the subsequent taking into custody was based on probable cause, and as the Court stated:

"THE COURT: No, there being a lawful arrest and having secured the house, actually, there was a right to make a search in connection with the arrest and there is no necessity that you must immediately go out and make the search so long as you do it reasonably in connection with the arrest and you are permitted to make it thoroughly, and the officers there being limited were probably well advised to just keep the scene secure until they could get somebody there who would conduct the search, probably someone more experienced than they to conduct the search, and I think the search incident to the arrest, the mere lapse of time from when the defendant was placed under arrest and the time when Mr. Chestnut got there and the search was made would not be an unreasonable delay in the search and it would be a search incident to the arrest. So the Motion to Suppress is denied for those reasons." (S RT 50, L 6-21)

The Tribal policemen receive an emergency call, which to them means a stabbing or a shooting, were they not supposed to check for signs of life on the body they saw a portion of through an open door?

Floyd Chestnut, the Criminal Investigator for the Bureau of Indian Affairs, testified he was in the high school on a

stake-out when the call came in to the station and when they tried to summon him by banging on the door he did not answer, thinking it was the burglars (S RT 36, L 23-24 and 43, L 13 to 44, L 1).

Counsel asserts that while the Tribal Police is trying to summon the Federal Officer they should have been down at Globe, Arizona, getting a search warrant.

The relevant test is not whether it is reasonable to procure a search warrant, but whether the search is reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. *United States v. Rabinowitz* (1950) 339 U.S. 56 at page 66.

It is respectfully submitted the Motion to Suppress was properly denied.

4. There was a sufficient showing of a chain of custody to show the .308 rifle, Government's Exhibit 1, was unloaded when Floyd Chestnut received it.

Appellant's counsel at page 42 of Appellant's Opening Brief asserts the objection was on the present condition of the weapon, without the safeguards of showing chain of possession, is irrelevant to the issues in the case. Reading of the transcript would show to the contrary as to the basis of counsel's objection:

"MR. HIRSH: Pardon me. I'll have to object to this as being irrelevant. I think there might be some probative value to determine if the clip was in it that particular evening, but I understand what evidence might be adduced subsequent to this time, but I don't feel it is relevant, the determination at this time whether there was a clip in the .308 at 10:00 o'clock in the evening. It has some significance of what might develop at a later time." (RT 222, L 19 to 223, L 1)

Passing for now the question of counsel changing the grounds for objection between the time of trial and of appeal, it is respectfully submitted the chain of custody was shown from the finding of the two rifles by Carl Nosie to Billy Kane who locked them in his car trunk (RT 73) until the rifles were handed to the Tribal Policeman Ed Kahn, who gave them to Floyd Chestnut. (RT 222)

In *Pasadena Research Laboratory v. United States* (9th Cir., 1948) 169 F.2d 375 at pages 381-382, this Court held there is a presumption that not only will public officers do their duty but private persons as well, unless the circumstances of the case overcome the presumption.

It is respectfully submitted there was a sufficient chain of custody shown to 10:00 p.m. on November 26, 1966.

With regard to Counsel's assertion that the objection at trial was to chain of custody, it is respectfully submitted the objection was to relevancy. Since Counsel has chosen to ignore those grounds on Appeal, the Government will not answer the relevancy argument, although it is respectfully submitted Appellant's Counsel should not be allowed to argue this new ground.

5. Reputation evidence as to truth and veracity must be based on the knowledge of the witness not the opinion.

As was set out in the Opposition to Specification of Errors, in paragraph 5, Appellant's Counsel's (Trial Counsel) offer of proof on Raymond Kane was that Kane had an opinion as to Coe Kane's reputation (RT 567, L 11-17).

The witness' testimony must not be based on his own opinion. Udall's *Arizona Law of Evidence*, §66, Character and Reputation, citing 7 Wigmore, *Evidence* (3rd ed.) §1981, 1982.

It is respectfully submitted the Court properly stated it would sustain an objection assuming there was an objection (RT 567, L 18-20).

6. Defendant's requested instruction number 14 was covered, insofar as it was proper, by the Court's instruction.

At page 11, Counsel asserts as error the Court's "failure to give the *following portion*" of defendant's requested instruction, and sets out the first paragraph only (with the first sentence of the first paragraph omitted) of a four paragraph instruction.

Appellant's counsel stated he had made his record by offering it (RT 597, L 22 to 598, L 1).

The Trial Court in ruling on the said instruction held as follows:

"14. It is to be given, except I have a first paragraph modified in my instruction and I don't use the last paragraph. I have my own first paragraph on this instruction and I don't use the last paragraph. It is covered by the Court's instruction insofar as proper." (RT 594, L 16-20) Defendant's Requested Instruction number 14 is as follows:

"You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. Ordinarily, it is assumed that a witness will speak the truth. But this assumption may be dispelled by the appearance and conduct of the witness, or by the manner in which the witness testified, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also

any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves."

The Court instructed as follows:

"In carrying out your function as judges of the credibility of the witnesses and the weight and effect of their testimony, you may take into account the manner in which the witness testifies, the character of the testimony given, any contradictory evidence which has been produced in the case. You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive, and state of mind, his or her manner and demeanor while on the witness stand. Consider also any relation each witness may bear to either side of the case the manner by which each witness may be affected by the verdict and the extent to which, if at all, each witness is either supported or contradicted by other credible evidence in the case.

"Inconsistencies and discrepancies in the testimony of a witness, or between the testimony of different witnesses may or may not cause the jury to discredit the testi-

mony. Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood." (RT 606, L 18 to 607, L 18)

As was stated by this Court in *Rivers v. United States* (9th Cir., 1966) 368 F.2d 362 at page 364:

"If proper and adequate instructions are given, defendant has no right to have his choice of language used in the way he prefers it. *Tucker v. United States*, 151 U.S. 164, 170, 14 S.Ct. 299, 38 L.Ed. 112 (1893)."

If counsel now argues the Court's Instruction which he had not heard at the time the Court ruled did not cover this point sufficiently, he had the opportunity to request it. As the Court told both Counsel:

"I told Mr. Hirsh that when the instructions are concluded, I will ask counsel if you have anything further and if either of you want to request something else or object to something I have given, just say yes and with that I will excuse the jury and we will make a record in the absence of the jury. I won't ask you if you want any exceptions or objections but just: 'Do counsel have anything further,' and you just say, 'Yes.'" (RT 598, L 3-10)

Mr. Hirsh had nothing further (RT 627, L 2).

Now he argues that it should have been given and gives as a reason that it appears the expert testimony was rejected (page 49 of Opening Brief). This somewhat illogical argument overlooks the law on expert opinions as was stated by the Trial Court (and as was set in Argument, paragraph number 1):

". . . or if you should conclude that the reasons given in support of the opinion are not sound, you may reject the opinion entirely." (RT 608, L 5-7)

7. Defendant's requested instruction number 28 was covered insofar as it was proper, by the Court's instruction.

Defendant's requested instruction number 28 was as follows:

"In the case of certain crimes it is necessary that in addition to the intended act which characterizes the offense, the act must be accompanied by a specific or particular intent without which such a crime may not be committed.

Thus in the crime of murder or manslaughter, a necessary element is the existence in the mind of the perpetrator of the specific intent to unlawfully take the life of another human being and unless such intent so exists that crime is not committed."

The Court instructed at page 612-613 on malice aforethought:

"Malice is the formed desire of doing mischief to another. It includes anger, hatred, revenge, and every other unlawful or unjustifiable motive. It is not confined to ill will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive—a thing done with a wicked mind—where the fact has been attended with such circumstances as evince a plain indication of a heart reckless of ordinary duty and bent on mischief.

"Malice may be sufficiently shown if a dangerous act likely to produce death or great bodily injury is committed deliberately by a sane person with reckless disregard of consequences and without legal justification.

"If a sane man assaults another under circumstances which will not in law either justify, excuse or extenuate the assault, and with intent to do him bodily injury, and death results, malice sufficient to constitute murder will be implied if the act be of such nature as plainly and in the ordinary course of events must put the life of the deceased in jeopardy, although the resulting consequences, that is, the death of the assaulted party was not specifically con-

templated. In this regard, every sane man is presumed to contemplate and intend the natural and probable consequences of his own deliberate acts.

"The word 'aforethought' used in connection with malice in the definition of murder implies an action of the brain prior to the act causing death. The term aforethought implies a malicious intention preceding the doing of the act which results in death.

"You will recall that murder in the first degree is defined as murder that is willful, deliberate, malicious and premeditated. The terms malice and malice aforethought have just been defined to you in these instructions.

"The word willful as used in the definition of first degree murder means intentional as distinguished from accidental or involuntary." (RT 612, L 6 to 613, L 21)

The Court then went out to complete the murder instruction and went on to define voluntary manslaughter.

"Voluntary manslaughter is defined by the Statute as the unlawful killing of a human being without malice, upon a sudden quarrel or heat of passion. Voluntary manslaughter differs from murder in that the premeditation and deliberation and malice aforethought required for murder in the first degree, and the malice required for murder in the second degree, are not necessary to a verdict finding voluntary manslaughter.

"Voluntary manslaughter is distinguished from murder principally in this: That though in voluntary manslaughter the act which occasions the death be unlawful or likely to be intended with bodily mischief, that the malice, express or implied, which is an essential element of murder is wanting, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionately lenient.

"When the mortal blow, although unlawful, is struck in the heat of passion or excited by a sudden quarrel, such as amounts to adequate provocation, the law out of forbearance for the weakness of human nature will disregard the actual intent and will reduce the offense to manslaughter.

ter. In such case, even if an intent to kill exists, the law deems that malice, which is an essential element of murder, is absent.

"To reduce an intentional felonious homicide from the offense of murder to voluntary manslaughter on the ground of sudden quarrel or heat of passion, the provocation must be considerable. That is to say, it must be of such a character and degree as naturally would excite and arouse the passion and the assailment must act under the smart of the sudden quarrel or heat of passion." (RT 616, L 14 to 618, L 22)

The Court also instructed on intent:

"In every crime there must exist a union or joint operation of act and intent, and the burden is always on the prosecution to prove both act and intent beyond a reasonable doubt.

"Intent may be proved by circumstantial evidence. In fact, it ordinarily can be established by no other means. This is true because while witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye witness account of the state of mind with which acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged. It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. In determining the issue as to intent, the jury are entitled to consider all of the statements made and the acts done or omitted by the accused and all facts and circumstances in evidence which may aid in determining state of mind.

"Intent and motive should never be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted. The motive or lack of motive of the accused is immaterial except insofar as evidence of motive or lack of motive may aid in determining the state of mind or aid in determining intent." (RT 623, L 7 to 624, L 6)

It is respectfully submitted the jury was properly instructed.

8. The foundation question to Appellant and the witness supplying the question to Appellant by decedent was properly admitted.

As was pointed out in the Statement of Facts, Trial Counsel conceded the question to be put to Coe Kane (RT 400 L 23 to 401 L 2) was proper cross-examination at the time counsel were at the side of the bench (RT 401, L 7-10).

The question was then put to Coe Kane and his counsel objected (RT 403, L 10-15). The Court overruled the objection and Coe Kane said he did not recall (RT 403, L 20). Coe Kane tried to limit the answer to October and counsel stated anytime in 1965 (RT 403, L 21 to 404, L 1) and he did not recall it.

This question had been preceded by the following questions:

"Q '60, and it was from that time on you told Dr. Cutts you had no further difficulties with your wife?

"A Yes, ma'am.

"Q Never had arguments about anything else?

"A We do have arguments and fights but not, you know, regular, just once in a while you might say.

"Q What would these arguments consist of?" (RT 399, L 9-15)

Appellant's Counsel objected and the Court overruled it. Then the next questions and answers followed:

"Q (By Miss Diamos) These arguments that you said occur with her regularly, what were the arguments about?

"A Mostly money problems.

"Q Any drinking problems, any arguments about that?

"A Yes, ma'am.

"Q Any arguments about anything else?

"A Drinking and money is all.

"Q Pardon?

"A Just those two.

"MISS DIAMOS: If the Court please, I would ask to approach the bench on these next questions." (RT 400, L 6-16)

Mrs. Gladys Whatoname testified as follows:

"Q How did she say it, what were her words, what words did she use?

"A Use the same words?

"Q Yes, the words, use the same words.

"A Yes.

"Q Would you?

"A Yes.

"Q Tell us please.

"A She wanted to go home with me.

"THE COURT: Did she say that?

"A Uh-huh.

"THE COURT: It may stand.

"Q (By Miss Diamos) Did she say anything else?

"A On account of Coe going with another lady.

"Q Did she say that?

"A Uh-huh.

"Q Did she say anything about the children?

"A And wanted to know if Coe could let her have the kids so she can go home with us.

"Q Did she say anything else about Coe?

"A If he still wanted to go with the girl, 'I would like to go home with my mother.' That is all she said to Coe. Coe didn't answer." (RT 575, L 10 to 576, L 7)

Counsel asserts this is hearsay. Coe Kane stated they argued over money and his drinking. This argument was over a different subject and occurred approximately one year before her death.

As was stated in Udall, *Arizona Law on Evidence*, §63, Impeachment by Prior Inconsistent Statements, at page 87:

"Similarly, a witness may be impeached by a showing that a statement of fact contrary to his present testimony

was made on a former occasion in his presence and adversely affecting his rights, and that he made no reply." Citing McCormick on Evidence, §34.

It is respectfully submitted the questions were properly admitted, as was the testimony of Gladys Whatoname.

9. The alleged "numerous arrests" of other Indians on the reservation was properly excluded.

It should be pointed out that Appellant's Counsel offer of proof was insufficient:

"Q Mr. Lupe, are you familiar with the police records in Whiteriver?

"A I don't." (RT 255, L 18-20)

Whether or not there are "numerous" arrests was not established.

Furthermore, Appellant's Counsel overlooks the point of the questions and the reasoning in *Michelson v. United States*, supra.

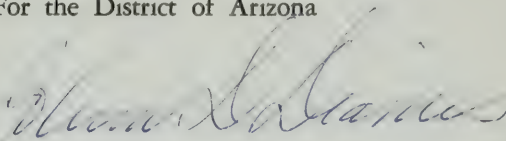
It is respectfully submitted the evidence was properly rejected.

VI.
CONCLUSION

There was sufficient evidence to find Coe Kane sane beyond a reasonable doubt and the jury was properly instructed and the evidence of the Government was properly admitted.

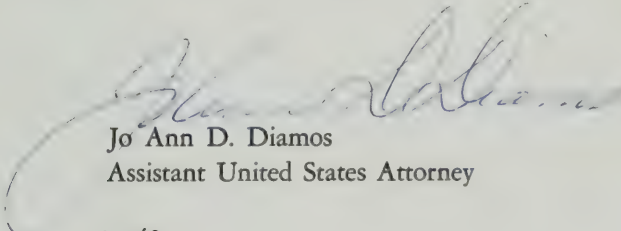
Respectfully submitted,

Edward E. Davis
United States Attorney
For the District of Arizona



Jo Ann D. Damos
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Damos
Assistant United States Attorney

Three copies of the Brief of Appellee mailed this
day of ~~February~~, 1968, to:

ROBERT J. HIRSH
402 West Pennington Street
Tucson, Arizona 85701
Attorney for Appellant

United States
COURT OF APPEALS
for the Ninth Circuit

No. 22169

LANE-COOS-CURRY-DOUGLAS COUNTIES
BUILDING AND CONSTRUCTION TRADES
COUNCIL, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 22169-A

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JENS HORSTRUP,

Respondent.

Case No. 22169 on Petition for Review of an Order
of the National Labor Relations Board

Case No. 22169-A on Petition for Enforcement of an
Order of the National Labor Relations Board

PETITIONER'S OPENING BRIEF IN CASE NO. 22169

PAUL T. BAILEY
STEPHEN M. MALM
BAILEY, SWINK AND HAAS
617 Corbett Building
Portland, Oregon 97204
Attorneys for Petitioner

FILED

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NOS. 22169 and 22169-A

United States
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BUILDING AND CONSTRUCTION TRADES
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**Case No. 22169 on Petition for Review of an Order
of the National Labor Relations Board**

**Case No. 22169-A on Petition for Enforcement of an
Order of the National Labor Relations Board**

PETITIONER'S OPENING BRIEF IN CASE NO. 22169

JURISDICTION

Case No. 22169 is before the Court upon the petition of the Lane-Coos-Curry-Douglas Counties Build-

ing and Construction Trades Council, pursuant to Sec. 10(f) of the Labor-Management Relations Act, as amended (29 U.S.C. § 169(f)), for review of the decision of the National Labor Relations Board finding a violation of Section 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)). The petitioner is an aggrieved party under Sec. 10(f) (29 U.S.C. § 160(f)).

The General Counsel of the National Labor Relations Board has petitioned, pursuant to Sec. 10(e) of the Labor-Management Relations Act, as amended (29 U.S.C. § 160(e)), in case number 22169-A, for enforcement of the order of the National Labor Relations Board against Jens Horstrup, a party respondent to the original proceedings herein. Attorneys for the petitioner in Case No. 22169 also represent respondent Horstrup in Case No. 22169-A.

R. A. Chambers & Associates, the charging party herein, is an employer within the meaning of Sec 2 (2) of the Labor-Management Relations Act, as amended (29 U.S.C. 152(2)), and engaged in commerce within the meaning of Secs. 2(6) and 2(7) (29 U.S.C. §§ 152(6) and 152(7)). (Cr. 5, 12, 33). The petitioner, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, is a labor organization within the meaning of Sec. 2(5) of the Labor-Management Relations Act, as amended (29 U.S.C. § 152(5)) (Cr. 5, 13, 33). No issue of the National Labor Relations Board's jurisdiction is presented.

STATEMENT OF THE CASE

The charging party, R. A. Chambers & Associates (hereinafter Chambers) is an employer functioning as a general contractor in the building and construction industry in the vicinity of Eugene, Oregon (Tr. 22-25).¹ Approximately 60% of the work performed by Chambers is done through subcontractors or by means other than the use of Chambers' own employees (Tr. 117). Except in isolated cases, Chambers directly employs only carpenters and laborers (Tr. 117-118). Furthermore, many of these are not employed on a permanent basis, but work and then are laid off according to how many are needed for a particular job (Tr. 121-122).

The Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council (hereinafter Council), petitioner before this Court, is a labor organization (Cr. 13, 33) whose membership consists of various affiliated local building trades unions (Tr. 10, 152, G.C. Ex. 17). Membership is not extended to any individuals or employees of any employer (Tr. 152). The purpose of the Council is to coordinate the activities of its affiliated local craft unions and promote jurisdictional harmony between them (Tr. 9). The Council also works to obtain execution by general contractors of its Building Trades Articles of Agreement (Tr. 9, G.C. Ex. 18). The Articles of Agreement are designed solely to regulate the relationship

¹ Tr. refers to Reporter's Transcript. Cr. refers to Clerk's record of pleadings. See Appendix B, *infra*, p. 37 for offer, identification and receipt of exhibits.

between signatory general contractors and subcontractors with whom they contract regarding the terms and conditions of subcontracting (see Paragraph IV, G.C. Ex. 18).

In 1956, Chambers executed Building Trades Articles of Agreement with the Council (Resp. Ex. 4), similar to the agreement (G.C. Ex. 18) currently in use (Tr. 16). This agreement could only be terminated by written notice at least thirty days prior to November 29 of any given year (see Preamble to Resp. Ex. 4). Chambers first gave such written notice by letter dated February 4, 1965 (Tr. 58-59, G.C. Ex. 3). This was the only notice received by the Council (Tr. 155). More than once during the duration of the contract, problems arose concerning its enforcement (Tr. 39). Chambers was definitely of the impression that the contract would continue in full force and effect unless written notice of termination was given (Tr. 59).

Early in 1965, Chambers purportedly assigned all of its bargaining rights to the Eugene Contractors Association regarding negotiations with local craft unions. Between January 1, 1965 and July 21, 1965, Chambers allegedly became a signatory to collective bargaining agreements with four craft unions (carpenters, laborors, cement masons, and iron workers) by virtue of the Eugene Contractors Association having executed contracts with those labor organizations (Cr. 14).

Subsequently, on November 24, 1965 (Tr. 39),

Chambers was informed by the Council that its Building Trades Agreement would expire on November 29, 1965 (Tr. 42). Chambers was also requested to execute a new Building Trades Agreement (G.C. Ex. 18) at that same time. Chambers would not agree to the execution of a new agreement, and on April 13, 1966, Robert Gardner, construction superintendent of Chambers (Tr. 103), was informed that picketing would commence if new articles of agreement (G.C. Ex. 18) were not executed (Tr. 104-105). The picketing here in question then began on April 14, 1966 (Tr. 102). The picketing terminated on April 21, 1966 (Tr. 108).

The Eugene Contractors Association, on behalf of Chambers, filed an unfair labor practice charge against the Council on April 15, 1966 (Cr. 3). Following issuance of a complaint and conduct of a hearing on the matter, the Trial Examiner issued a decision on January 6, 1967, finding that the Council's picketing violated Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)) (Cr. 12-19). The National Labor Relations Board, in its decision and order dated June 19, 1967, affirmed this finding of the Trial Examiner (Cr. 33-35). From the Board's decision and order, the petitioner, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council prosecutes this appeal.

STATUTES INVOLVED

The following statutory provisions (set out in full, Appendix A, *infra*, pp. 33-36) are involved:

Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)).

Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(e)).

Sec. 8(f) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(f)).

Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159(c)).

QUESTIONS PRESENTED

Each question presented by this appeal was raised before the National Labor Relations Board.

1. Will the National Labor Relations Board be allowed to completely reverse the historically recognized pattern of labor relations and negotiations in the building and construction industry involving building trades councils such as the petitioner herein?

2. Has picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council violated Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A))?

a. Did picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council have as an object forcing or re-

quiring R. A. Chambers & Associates to recognize or bargain with a labor organization as the representative of its employees, or forcing or requiring its employees to accept or select a labor organization as their collective bargaining representative?

b. Had R. A. Chambers & Associates lawfully recognized another labor organization as the representative of its employees?

c. Could a question concerning representation appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159(c))?

SPECIFICATIONS OF ERROR

The Trial Examiner and National Labor Relations Board erred in their findings of fact, conclusions of law and entry of order, insofar as they determined:

1. That picketing by Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council had as an object forcing or requiring R. A. Chambers & Associates to recognize or bargain with a labor organization as the representative of its employees, or forcing or requiring its employees to accept or select a labor organization as their collective bargaining representative.

2. That R. A. Chambers & Associates had lawfully recognized another labor organization as the representative of its employees.

3. That a question concerning representation could not appropriately be raised by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 159(c)).

4. That picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council violated Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)).

SUMMARY OF ARGUMENT

1

The decisions of the Trial Examiner and National Labor Relations Board had the effect of completely reversing the historically recognized course of labor relations and negotiations in the building and construction industry. Their findings and orders holding that picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council violated Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)) clearly go beyond the scope of legislative intent in enacting that provision, compelling reversal by this Court.

2

Before picketing by a labor organization constitutes an unfair labor practice under Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)), there must exist:

1. An object of organization or recognition by

that labor organization as a bargaining representative;

2. Lawful recognition of another labor organization by the employer; and

3. A situation where a question concerning representation cannot appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159(c)).

The picketing in this case did not have an object of recognition or organization. Its sole purpose was to compel execution by R. A. Chambers & Associates of a subcontractor-oriented building trades agreement designed exclusively to regulate and govern the relationships between R. A. Chambers & Associates and other employers to whom it subcontracted work. The building trades agreement requires only that each subcontractor employed have executed current collective bargaining agreements with the local craft unions having jurisdiction of the work performed by the subcontractor's employees. The agreement provides expressly for the sanctity of local craft union agreements and in no way attempts nor is it intended to govern the relationships of any employer with his own employees. Furthermore, this subcontractor-oriented agreement is expressly permitted and made lawful by the construction industry proviso to Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(e)). Congress did not intend to make unlawful by Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)) what it expressly made lawful in Sec. 8(e) (29 U.S.C. § 158(e)).

In any event, and regardless of the object of the picketing here in question, at the time R. A. Chambers & Associates executed collective bargaining agreements in 1965 with various local craft unions, it was already bound to a building trades agreement executed in 1956 with the petitioning Council. Therefore, execution of those new agreements constituted unfair labor practices under Secs. 8(a)(1) and 8(a)(5) of the Labor-Management Relations Act, as amended (29 U.S.C. §§ 158(a)(1) and 158(a)(5)), and resulted in unlawful recognition of other labor organizations by R. A. Chambers & Associates.

Finally, at the time R. A. Chambers & Associates executed its agreements with local craft unions, the majority status of its employees as union members had not been established. Therefore, these craft union contracts constituted pre-hire agreements made lawful only by virtue of Sec. 8(f) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(f)). Sec. 8(f) expressly provides that such pre-hire agreements are not a bar to a petition for a hearing and election under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. 159(c)). A question concerning representation could appropriately be raised by the petitioning Council.

The National Labor Relations Board, having failed to show the existence of any one of the three elements required before a violation of Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)) may be found, improperly ruled that picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades

Council was an unfair labor practice under Sec. 8(b)(7)(A).

ARGUMENT

This case presents the underlying policy issue of whether the National Labor Relations Board will be allowed to completely alter the historical course of labor relations and negotiations in the building and construction industry. The question is of vital concern to building and construction trades unions throughout the entire country.

For many years after passage of the Wagner Act, the National Labor Relations Board (hereinafter Board) did not concern itself with the building construction industry. The Board's reasoning in not passing upon matters involving the building construction industry was based on the fact that this industry had peculiarities of its own. In fact, it was not until around 1949 (See for example Denver Building and Construction Trades Council, 82 NLRB 1195, 23 LRRM 1656 (1949)), that the Board did take cognizance of a case in this industry. The building and construction industry historically has had a different type of employer-employee relationship than any other.

In industrial-type employment, employees' jobs are substantially permanent. That is to say, they are employed by an employer and continue to stay in his employ for months, years and sometimes for a lifetime. This has never been true in the construction industry.

Construction unions have maintained a source of employment by establishing hiring halls. Employers in the construction industry have utilized these floating craft unionists for employment when needed in the course of building. This has established short-term employment, sometimes merely for days, and, for the most, for months. It has only been on large construction jobs such as a dam that an employee in the construction industry has worked in excess of a year. For these reasons, it has been impracticable to apply all the rules of the Wagner Act and its successor, the Taft-Hartley Act, to the building construction industry.

The general contractor in this industry usually signs a contract for an entire project and then either subcontracts all of the project or at least the so-called subcraft union work to subcontractors. At most, the general contractor usually has only employed laborers for foundation work and other incidental work in the project, carpenters for framing and other forming work, iron workers if steel is used, hoisting and portable engineers to move heavy material and teamsters for transportation. All other work to be done on such projects has then been subbed out.

In labor management relations, the employers, either individually or through associations, have negotiated traditionally with the four or five basic crafts, to-wit: carpenters, laborers, iron workers, hoisting and portable engineers and teamsters. Building and construction trades councils, which take into affiliation all crafts basically engaged in the construction

industry including the aforementioned five (with the present exclusion of the teamsters), include the subcrafts and as such have entered into contracts historically with general contractors and/or their associations establishing contract rights for all subcrafts. This has established an orderly method for handling the problems that arise. Rather than requiring negotiations with some thirteen or fourteen subcrafts, one contract does it all. This is the type of contract involved in these proceedings.

For years, local building and construction trades unions in Southwest Oregon have affiliated themselves with the petitioner, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council (hereinafter Council), which in turn is affiliated with the Oregon State Building and Construction Trades Council. During this time, the Council has negotiated building trades agreements with general contractors throughout the area. These agreements (G. C. Ex. 18) are not intended to require recognition of the Council nor are they intended to encompass bargaining on the wages, hours and working conditions of employees employed by the signatory contractors. The single purpose behind these agreements is to provide an orderly procedure for the contracting and subcontracting of work by these signatory contractors on a basis that is fair to workmen in all of the building and construction trades crafts, as well as to the contractor's competitors. Because a general contractor has complete control over an entire building project, the policy of the building trades unions,

through their affiliation with the Council and its execution of these agreements with various contractors, is to place on the general contractor the obligation of dealing only with subcontractors who have executed current working agreements with appropriate craft unions having jurisdiction of the work performed by their employees. These subcontractor-oriented agreements never were and are not now intended to deal with the general contractor's relations with his own employees. Rather, they are intended only to deal with his contracting and subcontracting of work and thereby his relations with other employers in the building and construction industry. As described above, this is the typical situation or procedure of building and construction trades unions throughout the country.

The effect of the decisions by the Trial Examiner and the Board in the instant case is to completely reverse and condemn this recognized and time-honored procedure used to coordinate and control the activities of the various building trades unions. The ruling has no basis whatever in the history of labor relations concerning the building and construction industry, and unequivocally goes beyond the intent of Congress in enacting Sec. 8(b)(7) of the Labor-Management Relations Act (29 U.S.C. § 158(b)(7)). Therefore, it is incumbent on this Court to reverse the Board's decision and hold that the Council's picketing did not constitute an unfair labor practice under Sec. 8(b)(7)(A) of the Labor-Management Relations Act (29 U.S.C. § 158(b)(7)(A)), *Grain Elevator, Local 418 v. NLRB*, 376 F.2d 774, 781 (D.C. Cir. 1967).

Picketing by the Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council was Outside the Scope of Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as Amended (29 U.S.C. Sec. 158(b)(7)(A)).

In order to sustain its position that the petitioning Council has engaged in picketing violating Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)), the Board must have established:

1. That picketing by the Council had as an object forcing or requiring R. A. Chambers & Associates (hereinafter Chambers) to recognize or bargain with, accept or select the Council as the collective bargaining representative of its employees;

2. That Chambers had lawfully recognized another labor organization; and

3. That a question concerning representation could not appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159 (c)), *NLRB v. Local 3, IBEW*, 362 F.2d 232 (2d Cir. 1966); *Local 627 Meat Cutters*, 163 NLRB No. 65, 64 LRRM 1374 (1967).

The Board has failed to meet this burden on all three counts.

(A) Forcing or requiring that Chambers bargain with or recognize, accept, or select the Council as bargaining representative of its employees was not an object of the Council's picketing.

The Council is an organization whose membership

is made up exclusively of local craft unions in the building and construction industry (Tr. 10, 152, G.C. Ex. 17), and which deals only with employers in that industry (Tr. 153). The Council's sole purpose is to coordinate the activities of its various union affiliates (Tr. 147-148) including the handling of problems involved with the contracting and subcontracting of work by general contractors (see Resp. Ex. 4 and G. C. Ex. 18). The Council does not take into membership any individuals or employees of any organization or employer (Tr. 148, 152). No representation is made that the Council is seeking to represent the employees of any employer (Tr. 148), and the Council has never negotiated with an employer over the wages, hours or working conditions of his employees. No National Labor Relations Board election has ever been held in conjunction with a contractor's execution of the Council's Articles of Agreement (Tr. 153).

Picketing conducted at Chambers' construction site was for the sole purpose of obtaining Chambers' execution of the Oregon State Building and Construction Trades Council's Articles of Agreement (G. C. Ex. 18). These Articles of Agreement are designed exclusively to affect the relationship of a general contractor with his or its subcontractors (see preamble to G. C. Ex. 18) and in no way affect the relationship of the general contractor with his own employees or the relationships of subcontractors with their own employees. Quite to the contrary, the Articles of Agreement expressly provide for the sanctity of the agreements of the various local craft unions as regards the general contrac-

tor's relations with his or its own employees regarding matters of wages, hours and working conditions (see paragraphs I and II, G. C. Ex. 18). The only purpose of the Articles of Agreement is to obtain from general contractors an obligation to place in every contract or subcontract they make with another employer a provision that any work performed by the contractor or subcontractor coming within the jurisdiction of a craft union affiliated with the Council will be performed pursuant to an executed and current agreement with that local craft union (see paragraph IV, G. C. Ex. 18).

The decision of the Trial Examiner, added to and affirmed by the Board, indicates that they both entirely misconceive the scope and nature of the provisions of the Articles of Agreement. The Board's conclusion that the Articles of Agreement seek recognition for the Council as a bargaining agent simply because the provisions therein concerning contracting and subcontracting of work duplicate language contained in local crafts agreements to which Chambers is already a party (Cr. 33-34), is clearly erroneous. This analysis completely ignores the elementary fact that the Articles of Agreement deal exclusively with the relationship between Chambers and its subcontractors, while the local craft agreements which Chambers has executed concern relationships with its own employees, an entirely separate and unrelated matter. The local craft union activity is primary, seeking representation of Chambers' employees as a bargaining agent. The Council's activity is

secondary, seeking only to regulate the relationship between Chambers and other employers, in no way qualifying the relationship Chambers maintains with its own employees through negotiation and agreement with local building trades unions representing those employees.

This distinction between “primary” and “secondary” activity has long been recognized as in the case of *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 85 S. Ct. 441 (1964), where the Supreme Court defined as “primary” that activity affecting the relationships between an employer and his employees, and “secondary” that activity affecting relationships between several employers.

Viewing the matter in a slightly different light, the mere fact that picketing by the Council for a subject or demand (contracting and subcontracting clause) which could be and was lawfully negotiated between Chambers and the bargaining representative of its employees does not mean *per se* that the Council was seeking recognition as the bargaining agent of those employees. Such picketing can take place and yet not violate or be proscribed by Sec. 8(b)(7) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)), *Blinne Construction Co.*, 135 NLRB 1153, 49 LRRM 1638 (1962).

Likewise, the Trial Examiner’s analysis of the terms and provisions of the Articles of Agreement (G. C. Ex. 18) make it clear that he was either unable to accept or did not understand the nature and purpose

of such a building trades agreement. The Trial Examiner contends that Paragraph VII of the Articles of Agreement (G. C. Ex. 18) would in effect nullify a no-strike or arbitration clause in a local craft union agreement (Cr. 16). Paragraph VII, by stating that local agreements respecting these matters shall not be binding on the Council, has, in fact, exactly the opposite effect. The intent of this paragraph is to insure that the Council is clearly removed from craft union contractor disputes involving local collective bargaining contracts. It is the express intent of the Council not to interject itself into matters involving employer-employee disputes between Chambers and those it employs. The Council is only concerned with matters involving contractors such as Chambers and their dealings with other employers on a contractor or subcontractor basis.

Secondly, the Trial Examiner contends that Paragraph IX of the Articles of Agreement (G. C. Ex. 18) would modify the exclusive hiring hall provisions of the various local craft union agreements (Cr. 16). Article IX states that:

“ . . . In the event that any Employer, Developer and/or Owner-Builder, contractor or subcontractor is placed on the unfair list, it shall not be a violation of this Agreement for any employee to refuse to perform any work or enter upon the premises of the said Employer, Developer and/or Owner-Builder, . . . ”

This paragraph makes reference only to violations of the Articles of Agreement themselves and in no

way attempts to govern or modify the terms of local craft agreements or what activity will constitute a violation of the latter.

Finally, the Trial Examiner contends that Paragraph X of the Articles of Agreement (see Cr. 34, footnote 1, for fact that Trial Examiner inadvertently referred to Paragraph X as Paragraph XI) requires that Chambers bargain with the Council before modifications in the wages, hours and working conditions of his employees may be negotiated with the appropriate local craft union. Paragraph X simply states that the Articles of Agreement themselves cannot be amended without the approval of the Council. On the other hand, the Articles of Agreement expressly contemplate that any work by Chambers' employees will be performed according to an executed current agreement and subsequent agreements entered into with the local craft union having jurisdiction of the work involved (see Paragraph II). The Council expressly disaffirms any interest or participation in the negotiations for or terms of the collective bargaining agreements of the local crafts.

The entire record plus an accurate and careful reading of the Articles of Agreement as analyzed above undeniably establishes that the Board has utterly and completely failed to establish "substantial evidence" required to support the conclusion that picketing by the Council was violative of Sec. 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)), *NLRB v. Local 3 IBEW*, 362 F.2d 232 (2d Cir. 1966). Conversely, the

record and the Articles of Agreement show beyond any question that the Council, by picketing at Chambers' construction site to obtain its execution of the Articles of Agreement, had no intent to force or require that Chambers bargain with the Council as the representative of its employees.

Proof of a recognition or an organization object behind picketing is an essential prerequisite to finding an unfair labor practice under Sec. 8(b)(7)(A) of the Labor-Management Relations Act. (29 U.S.C. § 158(b)(7)(A)), *NLRB v. Local 3, IBEW*, 362 F.2d 232 (2d Cir. 1966). Where, as here, picketing is conducted solely to demand that subcontracted work be handled by subcontractors having executed and current agreements with the various local craft unions having jurisdiction of the subcontractor's employees, the Board has consistently ruled that there is no recognition or organization object and the picketing does not constitute an unfair labor practice, *IBEW, Local 903*, 154 NLRB No. 10, (1965) CCH NLRB 9600; *Bldg. & Construction Trades Council*, 141 NLRB No. 2, 52 LRRM 1269 (1963).

Examining this matter further by way of analyzing the construction industry proviso to Sec. 8(e) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(e)) it is equally clear that picketing by the Council in this case did not violate Sec. 8(b)(7)(A). The following remarks by then Senator Kennedy establish that Congress, in enacting Sec. 8(e), without exception, intended to preserve the historically recognized legality of building and construc-

ton trades agreements similar to the Articles of Agreement here in contention:

“The first proviso under new section 8(e) of the National Labor Relations Act is intended to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project . . .”

“Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a non-union contractor appear to be legal today. They will not be unlawful under section 8(e). . . .”

“It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.”

CONG. REC., Senate — September 3, 1959, p. 1433.

Likewise, the courts have interpreted Sec. 8(e) as preserving the status quo in the building and construction industry and have expressly recognized the validity and legality of building trades agreements requiring that a contractor subcontract work only to employers who have executed current agreements with the local craft unions having jurisdiction over the work performed by their employees, *National Woodwork Mfgs. Assn. v. NLRB*, 386 U.S. 612, 87 S. Ct. 1250 (1967); *El Paso Bldg. and Construction Trades Council v. El Paso Chapter, Associated General Contractors of America*, 376 F.2d 797 (5th Cir. 1967).

This clear statement of congressional intent and the legal efficacy granted to subcontractor-oriented agreements by the courts compels the result that picketing to obtain such agreements is not in and of itself violative of Sec. 8(b)(7)(A) (29 U.S.C. 158(b)(7)(A)). Sec. 8(b)(7)(A) was enacted at the same time as Sec. 8(e), and where, as shown above, there is no object of recognition or organization in picketing conducted by a labor organization, Sec. 8(b)(7)(A) in no way limits the language of Sec. 8(e) recognizing the clear validity of building and construction industry subcontractor agreements.

This position is amply supported by analogy to recent decisions of the NLRB. In *Southern California Dist. Council of Hod Carriers*, 158 NLRB No. 28, 62 LRRM 1047 (1966) and *Orange Belt Dist. Council of Painters No. 48*, 153 NLRB No. 80, (1965) CCH NLRB 9551 (supplemental proceeding following remand from 328 F.2d 534 (D.C. Cir. 1964) the Board found that where a subcontractor-oriented building trades agreement was valid under Sec. 8(e), it would be anomalous to hold that economic action to obtain such an agreement was an unfair labor practice under Sec. 8(b)(4) of the Labor-Management Relations Act (29 U.S.C. § 158(b)(4)). Similarly, it would be anomalous to hold that Sec. 8(b)(7)(A), which was adopted at the same time as and makes no reference to Sec. 8(e), proscribes picketing to obtain such an agreement where no recognition or organization object is present.

(B) Chambers had not lawfully recognized any other labor organization as the representative of its employees at the time picketing by the Council took place.

In order for picketing to violate Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)) it must be shown that the employer involved has lawfully recognized another labor organization as the representative of his or its employees, *NLRB v. Local 3, IBEW*, 362 F.2d 232 (2d. Cir. 1966). The record of the instant case makes no showing that another labor organization had lawfully been recognized by Chambers, thus it fails to meet the "substantial evidence" test requirement applicable in this area (see for example *NLRB v. Great Atlantic & Pacific Tea Company*, 340 F.2d 690 (2d Cir. 1965)).

As stated by the Trial Examiner, the Eugene Contractors Association negotiated collective bargaining agreements with four local craft unions (carpenters, laborers, cement masons and ironworkers) during the period January 1, 1965 to July 21, 1965 (Cr. 14). These contracts were allegedly negotiated on behalf of various contractors in the area, including Chambers. At this time, however, Chambers was still bound to a prior agreement executed with the Council on November 29, 1956 (see Resp. Ex. 4). By its terms, that agreement could not be terminated in any given year except by thirty days written notice prior to its November 29 anniversary date. R. A. Chambers first gave this written notice to terminate the agreement on February 4, 1965 through a letter forwarded on his behalf by the Eugene Contractors Association (Tr. 58-

59 and G. C. Ex. 3). This was the only notice the Council received (Tr. 155). Therefore, the agreement (Resp. Ex. 4) was not terminated until November 29, 1965.

The Trial Examiner's statement that the 1956 agreement (Resp. Ex. 4) was abandoned prior to 1965 (Cr. 15) is utterly without foundation. The direct testimony concerning application or enforcement of the agreement by R. A. Chambers himself reveals that questions concerning violations of the agreement had come up and a specific instance had occurred just prior to termination of the agreement in November of 1965 (Tr. 39). Furthermore, to say that Chambers considered the agreement terminated directly conflicts with Chambers' obvious feeling to the contrary that he had to give written notice of his intent to terminate the agreement in order to end its obligation thereunder (see Tr. 59 and C. G. Ex. 3). Chambers expressly stated that when the Eugene Contractors Association executed an agreement with the cement masons in 1965, he felt he was still bound to the terms of the 1956 building trades agreement (Tr. 58).

Assuming for a moment, without admitting, and only for the sake of argument, that the Council was the bargaining representative of Chambers' employees under the 1956 building trades agreement, it was then unlawful for Chambers, through the Eugene Contractors Association, to negotiate and execute agreements recognizing local craft unions as the rep-

representative of its employees while the 1956 agreement was in effect. Its doing so constituted an unfair labor practice under Secs. 8(a)(1) and 8(a)(5) of the Labor-Management Relations Act, as amended (29 U.S.C. §§ 158(a)(1), 158(a)(5)):

“The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see Sec. 9(a) of the Act, 29 U.S.C. Sec. 159(a), it exacts ‘the negative duty to treat with no other.’ *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 44; and see *Virginian Railway Co. v. System Federation*, 300 U.S. 515, 548-549.” *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 64 S. Ct. 830 (1944).

Under these circumstances, the Council, to the exclusion of all other labor organizations, had the right to negotiate and bargain with Chambers over the terms of a new agreement in the fullest sense of those words once the 1956 building trades agreement had expired on November 29, 1965, despite the existence of the previously executed local craft union agreements, *Independent Stave Co., Inc. v. NLRB*, 352 F.2d 553 (8th Cir. 1965). Execution of those local craft union agreements did not constitute lawful recognition of another labor organization, and picketing by the Council in April of 1966 to obtain a new agreement could not constitute a violation of 8(b)(7)(A), *NLRB v. Local 3, IBEW*, 362 F.2d 232 (2d Cir. 1966).

Pursuing this one step further, since execution of the local craft union agreements violated Secs. 8(a)

(1) and 8(a)(5) (29 U.S.C. § 158(a)(1) and 158(a)(5)), and did not cause a break in any alleged representation of Chambers' employees by the Council under the 1956 agreement, picketing by the Council in 1966 constituted only economic pressure to compel Chambers to agree on the terms of the new contract. It was not for an object of obtaining initial recognition as the bargaining representative of Chambers' employees and therefore could not be in violation of Sec. 8(b)(7) (29 U.S.C. § 158(b)(1)), *Local 612, Teamsters*, 150 NLRB No. 40, 58 LRRM 1047 (1964).

(C) At the time picketing by the Council took place a question concerning representation could appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act (29 U.S.C. Sec. 159(c)).

For the Council's picketing to constitute a violation of Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)), it must have been the case that a question concerning representation could not appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. 159(c)), *General Truck Drivers, Warehousemen & Helpers, Locals 980 & 624*, 158 NLRB No. 103, 62 LRRM 1153 (1966). There is no showing in the present case that such a question could not appropriately be raised as respects Chambers' employees.

R. A. Chambers, the only witness testifying as to the matter, made it clear that he could only guess or suppose whether or not any of his employees were un-

ion members in 1965 when contracts were executed with various craft unions through the Eugene Contractors Association (Tr. 129-131). Chambers readily admitted that health, welfare and pension benefits were paid on non-union as well as union employees (Tr. 130) so that this would not indicate to him whether or not any of his employees were union members. He has no policy of union membership as a condition of employment (Tr. 130). His testimony indicated basically that he had no accurate way of knowing the number of union workers in his employ. It is significant to note in this regard that the Trial Examiner's decision nowhere discusses this matter of the status of Chambers' employees while the Board's decision states that all of Chambers' employees were union members (Cr. 34) without citing any place in the record which supports that conclusion. Quite to the contrary, the record fails to show to any degree constituting substantial evidence that a majority of Chambers' employees were union members.

Because Chambers is an employer in the building and construction industry (Tr. 21, 116-117) and because the majority status of its employees respecting union membership had not been established prior to the time it became bound to various local craft union agreements in 1965, its agreements with those unions were in effect pre-hire contracts made valid only by Sec. 8(f) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(f)), *McLeod v. Electrical Workers (IBEW), Local 3*, — F. Supp. —, 57 LRRM 2052 (D.C. S.D. N.Y. 1964); *Alton-Wood*

River Bldg. Trades Council, 144 NLRB No. 31, 54 LRRM 1040 (1963). A Sec. 8(f) collective bargaining agreement is not a bar to the raising of a question concerning representation under Sec. 9(c) (29 U.S.C. § 159(c)), *McLeod v. Electrical Workers (IBEW), Local 3*, — F. Supp. —, 57 LRRM 2052 (D.C. S.D. N.Y. 1964); *Island Construction Co.*, 135 NLRB No. 1, (1962) CCH NLRB 10,820, and picketing by the Council, whether or not for an object of recognition or representation, did not, therefore, violate Sec. 8(b) (7)(A) (29 U.S.C. § 158(b)(7)(A)), *Alton-Wood River Bldg. Trades Council*, 144 NLRB No. 31, 54 LRRM 1040 (1963).

In its brief to the Board, the charging party contended that the Council cannot put in issue the question of whether a majority of Chambers' employees were union members because:

1. More than six months have passed since his execution of agreements with local craft unions; and
2. His execution of those agreements raises a rebuttable presumption of their validity (Cr. 31).

This assertion entirely misconstrues the purpose behind the Council's questioning of the majority status of Chambers' employees and the law applicable in this area.

Unlike the situations in *Shamrock Dairy, Inc.*, 119 NLRB No. 134, 41 LRRM, 1216 (1957) and *NLRB v. Local 3, IBEW*, 362 F.2d 232 (2d Cir. 1966) cited by the charging party (Cr. 31), the Council does not question the majority union status of Chambers' em-

ployees to assert that Chambers has unlawfully recognized the various local craft unions as the bargaining representative of his employees. The Council's sole purpose is simply to show that Chambers contracts with the local crafts, whether lawful or not, were executed under authority of Sec. 8(f) (29 U.S.C. § 158(f)) and therefore were not a bar to raising a question concerning representation under Sec. 9(c) (29 U.S.C. § 159(c)). Under these circumstances, the six-months' limitation applied to cases involving the invalidity of labor agreements and resulting unfair practices and the rebuttable presumption also arising in such situations have no place or significance, (see *Alton-Wood River Bldg Trades Council*, 144 NLRB No. 31, 54 LRRM 1040 (1963) as an example of the Board making inquiry into a union's majority status in a situation analogous to that of the instant case).

CONCLUSION

The Board's decision has created a dilemma which can only be resolved by this Court finding that the Council's picketing did not constitute an unfair labor practice under § 8(b)(7)(A) of the Labor-Management Relations Act, as amended (29 U.S.C. § 158(b)(7)(A)). If the Court finds that the Council had no purpose or object of recognition by or representation of Chambers' employees, then clearly Sec. 8(b)(7)(A) has not been violated. If, on the other hand, a recognition or representation object is found, then, as detailed above, the Court still must find that Chambers

unlawfully recognized another labor organization as the representative of its employees and that a question concerning representation could appropriately be raised under Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. § 159(c)). Likewise in this event, Sec. 8(b)(7)(A) (29 U.S.C. § 158(b)(7)(A)) has not been violated. The decisions of the Trial Examiner and the National Labor Relations Board must be reversed.

PAUL T. BAILEY

STEPHEN M. MALM

Of Attorneys for the Petitioner

BAILEY, SWINK & HAAS

617 Corbett Building

Portland, Oregon 97204

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL T. BAILEY

Of Attorneys for the Petitioner

APPENDIX "A"

Sec. 8(b)(7)(A), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(7)(A)):

"Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents

* * * * *

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act."

Sec. 8(e), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(e)):

"Sec. 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other

person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purpose of this subsection (e) and section 8(b)(4)(B) of the terms 'any employer,' 'any person engaged in commerce or in industry affecting commerce,' and "any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry; *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception."

Sec. 8(f), Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158 (f)):

"Sec. 8(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged, (or who, upon their employment, will be engaged in the building and construction industry with a labor organization of which building and construc

tion employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9 (e)."

Sec. 9(c) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 159(c)) :

"(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in

their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

“(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a): the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.”

APPENDIX "B"

List of Exhibits Referred to
in Petitioner's Opening Brief

<i>Exhibit</i>	<i>Offered</i>	<i>Identified</i>	<i>Received</i>
Gen. Counsel # 3	Tr. 7	Tr. 4-7	Tr. 9
Gen. Counsel #17	Tr. 17	Tr. 10	Tr. 18
Gen. Counsel #18	Tr. 17	Tr. 13	Tr. 18
Respondent #4	Tr. 114	Tr. 114	Tr. 115

United States Court of Appeals

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Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

FILED

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WM. B. LUCK, CLERK

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
GLEN M. BENDIXSEN,
Attorney,
National Labor Relations Board.

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On Petition to Review and Set Aside,
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Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon a petition to review and set aside an order of the Board issued against the petitioner (Council) in No. 22169 and respondent (Horstrup) in

No. 22169-A, on June 19, 1967, following proceedings under Section 10 of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*).¹ In its answer in No. 22169, the Board has cross-petitioned for enforcement of its order. In No. 22169-A the Board has petitioned for enforcement. The proceedings were consolidated by the Court in an order of October 11, 1967. The Board's decision and order (R. 12-19, 33-35)² are reported at 165 NLRB No. 86. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act, the unfair labor practices having occurred at Eugene, Oregon. No issue of the Board's jurisdiction is presented.

COUNTERSTATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Council and its agent, Holstrup, violated Section 8(b)(7)(A) of the Act by picketing R.A. Chambers and Associates for an object of recognition and bargaining at a time when Chambers was lawfully

¹ The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. A-1 through A-7.

² References designated "R." are to Volume I of the record as reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II of the record. "G.C. Exh." refers to exhibits of the General Counsel filed with the Court; "R. Exh." refers to exhibits of the Council and Holstrup (respondents before the Board). Wherein a semi-colon appears, references preceding are to the Board's finding; those following are to the supporting evidence.

recognizing other unions and a question concerning representation could not appropriately be raised under Section 9(c). The evidence on which these findings rest is summarized below.

The Council is one of ten subordinate bodies of the Oregon State Building and Construction Trades Council. The Council operates in four counties and has 18 affiliated local unions (R. 13; Tr. 9-13, 156-161, G.C. Exh. 2, 16, 17, 19). Holstrup is secretary-treasurer of the Council. Holstrup also holds offices in and acts on behalf of some of the local unions (R. 2-3; Tr. 8-9, 17, 29, 72, 79-80, 92-93, 151, 154, 155, G.C. Exh. 12 [p. 13]).

R. A. Chambers & Associates is a general contractor and builder in the construction industry, and is located in Eugene, Oregon. On November 29, 1956, Chambers signed a Council agreement of statewide application. This memorandum agreement did not deal directly with terms and conditions of employment. Rather, the agreement was aimed primarily at requiring the employer signatories to hire only members of the Council's local unions. The agreement was for 1 year with automatic renewal unless 30 days notice of cancellation was given. From 1956 until 1965 and the events described below, the Council did not charge Chambers with violating the agreement, Chambers having been somewhat unconcerned with the agreement's existence and automatic renewal on November 29 of each year (R. 13-14; Tr. 15-16, 39-41, 45-47, 53-54, 65-69, R. Exh. 4).

In early January 1965, Chambers joined the Eugene Contractors Association ("Association"), which represents contractors in the area, and designated it as his exclusive bargaining spokesman (R. 14; Tr. 27-28, 43-44, 57, 59, 61, 64, 88-89, 95-96, 126). On February 4, 1965, Francis Kelley, the president of the Association, wrote Horstrup (the Council's

secretary-treasurer), stating that the Association had been assigned the bargaining rights of 15 named contractors, including Chambers. President Kelley also stated that these employers were giving notice of termination on their respective anniversary dates of the statewide memorandum agreement with the Council, and would not enter into a successor agreement of this nature with the Council (R. 14; Tr. 27-28, 43-44, 58-60, 87-88, 95-96, 155; G.C. Exh. 3). This February 4 notice applied to Chambers' 1956 memorandum agreement with the Council, which, as shown, had an anniversary date of November 29 and was not renewed if 30 days notice of termination were given.

The Association entered into negotiations with various local unions. Chambers was present and active in some of these negotiations, and in early 1965 became a party to four collective bargaining contracts which the Association entered into. The locals with which these four contracts were executed were the Laborers, Carpenters, Iron Workers, and Cement Masons. The contracts had various termination dates in 1967 and 1968. Horstrup participated in the negotiations with the Cement Masons and is a signatory to their contract with the Association (R. 14 n. 3; Tr. 28-34, 47-53, 55-56, 73, 76-80, 92-93, 123-124, G.C. Exh. 12 [p. 13], 13, 14, 15). When these contracts were executed, the employees of Chambers, whose work force averages 25, mostly carpenters and laborers, were all members of the appropriate local union (R. 34; Tr. 37-39, 54-57, 60-61, 116, 121-122, 129-131).

On or about November 24, 1965, Horstrup advised Chambers that the memorandum agreement with the Council expired on November 29, and invited Chambers to sign a new agreement. This new statewide agreement (hereafter

"Memorandum Agreement") is a modification and expanded form of the 1956 agreement which Chambers had signed.

The Memorandum Agreement provides, *inter alia*, that the employer will comply with the contracts entered into with the local craft unions, with certain exceptions. For example, the Memorandum Agreement specifies that the provisions in the local agreements respecting strikes, lockouts, grievance, arbitration, and jurisdictional disputes shall not be binding on the Council. The agreement specifies, in effect, that in the event of a failure of the employee to abide by the agreement, the employer's employees may cease work without risking discharge. The agreement also provides that employees may refuse to cross a primary picket line authorized by the Council. In contrast, the contracts Chambers executed with the local unions (*e.g.*, the Carpenters and the Laborers), contain arbitration and no-strike commitments, and commitments to furnish workers on request. The Memorandum Agreement sets forth various restrictions on subcontracting of unit work falling within the jurisdiction of the local unions. Basically, the employer is required to subcontract such work only to contractors who are signatories to contracts with local affiliates of the Council. The local contracts executed by Chambers contain lesser restrictions on subcontracting. The Laborer's contract, for example, requires only that a subcontractor must adhere to standards of employment contained in the Laborers' agreement. The Memorandum Agreement may not be modified by the locals without the Council's consent (R. 15-16, 34; Tr. 70-72, G.C. Exhs. 12 [pp. 3, 9-10], 13 [pp. 8-9], 14 [pp. 3, 9-10], 15 [pp. 3, 12-13]).

In response to Horstrup's request to sign the Council's Memorandum Agreement, Chambers stated that he had assigned his bargaining authority to the Association (R. 14; Tr.

39-43). As shown, in February 1965, several months before, the Association had given Horstrup notice of termination by Chambers of the 1956 agreement, and notice that he would not sign a successor memorandum agreement with the Council.

On April 1, 1966, Horstrup visited a Chambers' construction project. Horstrup told Chambers' foreman, Tobey Peoples, that Chambers had refused to "sign up" with the Council; therefore, Horstrup "might have to picket" him (R. 15; Tr. 73-75, 98-100). On April 13 Horstrup returned and told Foreman Peoples that the project would be picketed the following day. Peoples advised Construction Superintendent Robert Gardner, who telephoned Horstrup that afternoon for an explanation and asked how the picketing could be prevented. Horstrup replied that Chambers would have to sign the "Building Trades Council" agreement, that is, the Memorandum Agreement discussed above (R. 15; Tr. 100-103).

The next day, April 14, 1966, Horstrup began picketing the project, with picket legends reading as follows (R. 13, 15; Tr. 15-16, 44-45, 100-102, 107-108):

R. A. Chambers and Assoc. Working Conditions
Less Than Enjoyed by Unions Affiliated with
Lane-Coos-Curry & Douglas County Building
Trades Council. No disputes with any other
contractor exists on the job.

As a result of the picket line approximately 15 of Chambers' employees refused to enter the project and ceased all work. Employees of electrical and plumbing subcontractors on the job also refused to work. On April 21 the picketing ceased. The purpose of the picketing concededly was to "get" Chambers to sign the Council's Memorandum Agreement (R. 15; Tr. 15, 73-75, 102-103, 105-108).

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Council and its agent, Secretary-Treasurer Horstrup, violated Section 8(b)(7)(A) of the Act by picketing Chambers for an object of recognition and bargaining at a time when Chambers was lawfully recognizing other unions and a question concerning representation could not appropriately be raised under Section 9(c) of the Act (R. 15-16, 33-34). The Board's order requires the Council and Horstrup to cease and desist from the unfair labor practices found and to post the customary notice (R. 18-19, 35).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COUNCIL AND ITS AGENT, JENS HORSTRUP, VIOLATED SECTION 8(b)(7)(A) OF THE ACT BY PICKETING R. A. CHAMBERS AND ASSOCIATES.

INTRODUCTION

Section 8(b)(7)(A), in relevant part, proscribes picketing by an uncertified union or its agents where "an object" thereof is to force or require an employer "to recognize or bargain" with the labor organization as bargaining representative of the employer's employees where the employer has lawfully recognized another union as bargaining representative, and "a question concerning representation may not be raised under Section 9(c) of this Act" (*infra*, p. A-1). It is uncontested that the Council and its Secretary-Treasurer, Horstrup (collectively referred to hereafter as the Council). picketed

Chambers to obtain his signature to the Council's Memorandum Agreement, that this agreement covered Chambers' employees, and that at the time of the picketing Chambers was recognizing the Council's affiliated locals as the representatives of his employees and was a party to existing contracts with the locals. Thus, solely in issue are, first, the Board's finding that an object of the Council's picketing was recognition and bargaining; second, the Board's finding that a question concerning representation could not appropriately be raised. We discuss these issues below.

A. Substantial evidence on the whole record supports the Board's finding that the picketing was for an object of recognition and bargaining.

Section 8(b)(7)(A) protects the parties where the lawful authority of an incumbent union to continue as the employees' exclusive representative may not presently be challenged under the Act's election procedures. The section prevents an attempt to disrupt the bargaining relationship when the attempt is in the form of picketing by another union with an object of compelling the employer to deal with it as an employee representative. See *N.L.R.B. v. Local 3, I.B.E.W.*, 362 F. 2d 232, 234 (C.A. 2); Meltzer, *Organizational Picketing and the N.L.R.B.*, 30 Univ. Chi. L. Rev. 78, 79, 81-83 (1962). Cox, *The Landrum-Griffin Amendment to the NLRA*, 44 Minn. L. Rev. 257, 262-266 (1959). That the picketing may have other legitimate objectives is immaterial; the existence of "an object" forbidden by the statute is sufficient. A finding that it existed is a factual one, and is entitled to affirmance by the reviewing court if supported by the record. *N.L.R.B. v. Local 3, I.B.E.W.*, *supra*, 362

F. 2d at 235. Accord: *N.L.R.B. v. Carpenters Local No. 2133, etc.*, 356 F. 2d 464, 465-466 (C.A. 9); *Dayton Typographical Union No. 57 v. N.L.R.B.*, 326 F. 2d 634, 639-645 (C.A. D.C.); *Local 705, Teamsters v. N.L.R.B.*, 307 F. 2d 197, 198 (C.A. D.C.); *N.L.R.B. v. Local 182, Teamsters*, 314 F. 2d 53, 58-59 (C.A. 2); *Penello, etc. v. Retail Store Employees*, 188 F. Supp. 192, 199 (D.C. Md), *aff'd* 287 F. 2d 509 (C.A. 4).

The picketing union's objective need not be an explicit granting of recognition to fall within the statutory interdiction. It is sufficient that the employer can avoid picketing only by acceding to union demands which are tantamount to demands for recognition. *Centralia Building & Construction Trades Council v. N.L.R.B.*, 363 F. 2d 699, 701 (C.A. D.C.). Accord: *N.L.R.B. v. Local 182, Teamsters, supra*, 314 F. 2d at 57-58. The Council's admission that it picketed Chambers to obtain his signature to the Memorandum Agreement is cogent evidence that the picketing was for the proscribed objective. The Board, with court approval, has consistently taken the position that a demand that an employer sign a labor agreement establishes, at least *prima facie*, an object of recognition and bargaining within the statutory meaning. See, e.g., *N.L.R.B. v. Local 3, I.B.E.W.*, *supra*, 362 F. 2d at 235-236; *N.L.R.B. v. Carpenters Local No. 2133, etc.*, *supra*, 356 F. 2d at 466; *N.L.R.B. (Kansas Labor Press, Inc.) v. Lawrence Typographical Union No. 570, AFL-CIO*, 376 F. 2d 643, 653 (C.A. 10), and cases there cited. See also, *National Packing Company, Inc. v. N.L.R.B.*, 377 F. 2d 800, 803-804 (C.A. 10).

Essentially, the Council asserts (Br. 16) that the Memorandum Agreement contemplated the continued "sanctity" of the locals' contracts and bargaining authority, and did not fix the employees' basic terms of employment; therefore, no

recognitional or bargaining objective was involved in the demand that Chambers become a party to the agreement. The incriminating demand, however, need not be for an agreement which covers all bargainable matters; further, the agreement need not acknowledge (indeed, it may expressly deny) that the picketing union is acting as a representative of the employees. Thus, in *Centralia Building & Construction Trades Council v. N.L.R.B.*, *supra*, the union picketed to compel execution of an agreement which would provide only that the employees would receive wages and certain fringe benefits equal to those being paid to employees working under union contracts. Although the union repeatedly advised the picketed employer that it was not seeking "recognition," the Board concluded that Section 8(b)(7) applied and the Court held that the Board's conclusion was an allowable one: ". . . the net effect of [the employer's] entering upon the proposed agreement would have been to establish the [picketing union] as the negotiator of wage rates and benefits paid [the employer's] employees." (363 F. 2d at 701).

The Council was attempting to perform the role of "negotiator" in respect to collective bargaining matters within the exclusive statutory authority of the local union affiliates who represented the employees. As shown, *supra*, p. 5, the Memorandum Agreement which the Council sought to obtain by a picket line could not be modified by the locals without the Council's consent. That agreement purports, *inter alia*, to qualify the no-strike and arbitration obligations contained in the agreements with the locals. Moreover, the Memorandum Agreement places restrictions on subcontracting which are not contained in the agreements with the locals. Under settled law, employees have a statutory right to bargain through their own duly selected bargaining agent to

obtain legitimate restrictions on the subcontracting of unit work. See *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203. *National Woodwork Manufacturers Association, et al. v. N.L.R.B.*, 386 U.S. 612, 637-643. Picketing by another union to regulate the above terms and conditions of employment obviously preempts subjects of collective bargaining and warrants the Board's finding of a recognition and bargaining objective.

The regulation sought by the Council in the Memorandum Agreement may not be characterized as "in no way affect[ing] the relationship of [Chambers] with his own employees . . ." (Council Br. 16). The contractual no-strike and arbitration commitments undertaken by employees are cogent matters in the bargaining process, and central to the statutory policy of industrial peace. The proposal to restrict subcontracting to unionized employers, furthermore, is not merely an additional and permissible restriction supplementing those contained in Chambers' contracts with the locals. This assertion rests on the faulty premise that the choice of subcontractors with whom Chambers does business is the primary concern of the Council, as a caretaker spokesman for the locals generally. As demonstrated, however, the employees' chosen bargaining agent has the exclusive authority to negotiate limitations on subcontracting. The record is clear that Chambers and the locals had struck a bargain on that subject, and it may be assumed that acceptance of the lesser restrictions by the locals is reflected in their negotiating more favorable terms for the employees on other matters. The Council's attempt to alter this accommodation may not be dismissed as involving no intrusion on the bargaining relationships between Chambers and the locals.

For example, in *Dallas Building and Construction Trades Council*, 164 NLRB No. 139 (65 LRRM 1170), petition for

review pending, No. 21,057 (C.A. D.C.), a similar building trades council picketed employers whose employees, like those of Chambers, were currently represented by the council's affiliated locals and were covered by collective bargaining agreements negotiated with the locals. The object of the council's picketing also was to obtain agreements with the employers which provided, in essence, that if the employer decided to subcontract any work within the jurisdiction of the locals, such work would be subcontracted only to employers who were party to a bargaining contract with the appropriate local. In *Dallas*, the Board rejected the council's claim that its "threats and picketing did not have an object of recognition or bargaining because its proposed agreement about the subcontracting of work would have little or no effect on the employees of the picketed general contractors." (65 LRRM at 1171). As the Board emphasized, the restrictions placed on subcontracting delimit the employers with whom the signatory employer may deal, and thus influence whether he does the work with his own employees or by subcontract. As a result, the council's subcontract proposal would "significantly affect employees of the picketed general contractors to the extent that it regulated subcontracting of such work" (*ibid.*).

The Council (Br. 21-23) relies on Section 8(e) of the Act, which was added in 1959 to make unlawful various forms of "hot cargo" agreements. Under the proviso to that section, the building trades unions may seek agreements committing the employer to work on only those construction projects where all other on-site contractors and subcontractors recognize the appropriate union (*infra*, pp. A-2, 3). A union may not picket to enforce such union signatory subcontracting clauses. As the Council asserts, however, picketing solely to obtain the "proviso clause" does not

violate the secondary boycott prohibitions of Section 8(b)(4) of the Act. See *Northeastern Bldg. & Constr. Trades Council, et al. (Centlivre)*, 148 NLRB 854, enforcement denied on unrelated grounds, 352 F. 2d 696 (C.A. D.C.); *N.L.R.B. v. I.B.E.W., Local Union No. 683, AFL-CIO*, 359 F. 2d 385 (C.A. 6). Assertedly, the Council's Memorandum Agreement constituted a valid proviso agreement obtainable by use of a picket line.

Initially, this argument overlooks the recognitional and bargaining objective the Memorandum Agreement entailed by altering the no-strike and arbitration commitments contained in Chambers' contracts with the locals. The subcontracting proviso to Section 8(e) has nothing to do with these and other terms and conditions of employment, or with picketing to obtain them. In this respect, the proviso clearly does not grant the building trades unions any special privilege to engage in recognitional picketing.

No reason exists, moreover, to presume that Congress intended the restrictions of Section 8(b)(7) to be ignored whenever it may be said that the picketing is to obtain a subcontracting clause permitted by Section 8(e). The latter section and Section 8(b)(4) are directed at the use of a secondary boycott to implicate neutral employers in disputes not their own. See *N.L.R.B. v. District Council of Painters No. 48 and Paint Makers Local Union No. 1232*, 340 F. 2d 107 (C.A. 9), cert. denied, 381 U.S. 914; *N.L.R.B. v. Joint Council of Teamsters, No. 38*, 338 F. 2d 23, 28 (C.A. 9). On the other hand, Section 8(b)(7) applies to primary picketing and was enacted to limit the circumstances in which an employer may be picketed by a union which seeks to act as a bargaining spokesman for the picketed employer's employees.

Different statutory policies are thus embodied in these various subsections, and they must be construed harmoniously.

The Board applied them in that manner here when it condemned as recognitional the Council's picketing of Chambers to obtain, *inter alia*, a clause limiting subcontracting to union signatories. This does not operate to cut off Chambers' employees from concerted activity to obtain contractual clauses permitted by the proviso to Section 8(e). The Board's holding bars picketing for a proviso agreement only to the extent that such picketing is engaged in by a union other than the representative of the employees and, therefore, exceeds the limitations on recognitional picketing embodied in Section 8(b)(7).³

It is asserted that picketing by Council officials to obtain the memorandum agreement should be permitted since, in the distinct collective bargaining relationships in the construction industry, council securing of such agreements is a "time-honored procedure used to coordinate and control building trades unions" (Council Br. 11-14; *amicus* Br. 9-16). This alleged practice, however, does not impair the Act's placing of bargaining authority exclusively in the locals, where only those labor organizations had been designated by the employees. They had not selected the locals' parent or affiliated bodies, or included them in the grant of bargaining authority. See *N.L.R.B. v. Taormina Co.*, 207 F. 2d 251, 254 (C.A. 5); *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 236 F.2d 898, 904-905 (C.A. 6), affirmed in relevant part, 356 U.S. 342, 350; *N.L.R.B. v. National Truck Rental Co.*, 239 F.2d 422, 425 (C.A. D.C.), cert. denied, 352 U.S. 1016. See also, cited by the Council (Br. 26), *Independent Stave Co., Inc. v. N.L.R.B.*,

³ Thus, the Board's decision plainly does not result in "taking away from . . . construction industry bargaining . . . that which i[s] authorized in Section 8(e) and 8(b)(4)." (pp. 9-10 of the brief of the *amicus curiae*, Building and Construction Trades Department, AFL-CIO).

352 F. 2d 553, 559 (C.A. 8), cert. denied, 384 U.S. 962. Compare *I.B.E.W. (Franklin Electric Construction Co., 121 NLRB 143, 146-148; Chicago Typographical Union No. 16, etc., 86 NLRB 1041, 1045-1047, 1052-1055, 1060 n. 5, enforced sub nom. American Newspaper Publishers Association v. N.L.R.B., 193 F. 2d 782, 804-805 (C.A. 7), cert. denied as to this aspect, 344 U.S. 812.*⁴

If the Council's position were accepted, then employees in the construction industry would negotiate a contract with their employer, through their own lawful bargaining representative, without any assurance that another labor organization would be barred from altering the terms of the bargain by picketing. Section 8(b)(7), however, was intended to strengthen the federal policy of ensuring employees a free choice in the selection or rejection of a bargaining representative. See *N.L.R.B. v. Drivers, Local No. 639 (Curtis Bros.)*, 362 U.S. 274, 291. Here, as we show *infra*, the current choice of Chambers' employees to be represented exclusively by the locals could not be challenged. The Board properly held that the Council could not interpose indirectly into those bargaining relationships by attempting to force Chambers to enter into a contract affecting the employees' employment rights. It is no defense that in picketing Chambers the Council was not seeking to displace the locals. As shown, the statute has consistently been held a bar to picketing to compel recognition as a collective

⁴ Application of the statute in a manner consistent with Congressional objectives, moreover, is required even if, as asserted, it bears more heavily on the bargaining relationships in the construction industry. As held in a slightly different context: "We also realize the difficulty the building crafts have with the secondary boycott provisions of the . . . Act, but this Court is not the forum in which to seek relief from what the union characterizes as 'the shackles' of this statute." *Local No. 5 United Ass'n, etc. v. N.L.R.B.*, 321 F. 2 366, 370 (C.A. D.C.), cert. denied, 375 U.S. 921.

bargaining spokesman on matters reserved for the exclusive employee representative, and not just picketing to oust the representative.⁵

Moreover, one of the underlying purposes of Section 8(b)(7) was to insulate an employer from “‘blackmail’ picketing by a union not lawfully entitled to recognition as representing a majority of the employees.” *Dayton Typographical Union No. 57 v. N.L.R.B.*, *supra*, 326 F. 2d at 637. See also *Local 542, Operating Engineers (R. S. Noonan, Inc.)*, 142 NLRB 1132, 1135, enforced 331 F. 2d 99, 107 (C.A. 3), cert. denied, 379 U.S. 889. In the circumstances of this case, Chambers was entitled to that protection. A different result is not dictated here by the absence of evidence that the locals objected to the Council’s intrusion. As stated by the Board in *Dallas (supra*, 65 LRRM at 1171-1172):

⁵ The use of the definite article in Section 8(b)(7), which speaks of recognition or bargaining as “the representative” (*infra*, p.A-1) is scarcely a word of limitation such as to establish a congressional intent to regulate only picketing to become “the exclusive” bargaining agent (*amicus* Br. 2-9). Compare, *Craig v. Boyes*, 11 P. 2d 673, 674, 123 Cal. App. 592; *Stevens v. Duncan*, 7 S.E. 2d 745, 746, 189 Ga. 730. And this argument, so at odds with the statutory scheme, has no support in the trial examiner’s adopted decision in *I.B.E.W., Local Union No. 903 (Pass Development Inc.)*, 154 NLRB 169, 176 (see *amicus* Br. 8 n. 6). There it was found that the council and an affiliated electricians’ local engaged in unlawful secondary boycott picketing of a general contractor to force him to cease using a nonunion electrical subcontractor. The 8(b)(7)(C) allegation of the complaint was dismissed. In significant contrast to the case at bar, however, the evidence did not show that the council or the local was seeking to negotiate the terms and conditions of employment of the employees of the picketed employer — the general contractor who employed no electricians.

We deem it immaterial that the Council-affiliated unions that have contracts with the Association would not consider the proposed subcontracting clause an intrusion on their status as collective bargaining representatives. Employers in the Association said the clause would intrude on their collective-bargaining relationships. Even if we were to find that the unions had waived their rights here, and that such waiver should influence the Board's unfair labor practice conclusions, the employers are entitled to the protection of Section 8(b)(7)(A) against actions which tend to erode or even destroy their right to operate, unimpeded by outsiders' threats and picketing, under the collective-bargaining terms lawfully negotiated with their employees' representatives.⁶

⁶ Contrary to the Council's contention (Br. 18, 21) the Board's previous decisions have not permitted such picketing. As shown, *supra*, p. 16 n. 5, *I.B.E.W., Local 903*, is wholly distinguishable on its facts. *Bldg. and Construction Trades Council, et al.*, 141 NLRB 38, 39 n. 2, 49-50, is like *I.B.E.W.* The Board found unlawful secondary boycott picketing of a general contractor to force him to cancel his contracts with non-union subcontractors, but dismissed an 8(b)(7)(C) allegation for lack of evidence that the Council or its local was seeking to negotiate on behalf of the general contractor's employees. *Blinne Constr. Co.*, 135 NLRB 1153, involved wholly dissimilar circumstances, where the union conceded the picketing was recognition but urged defenses having no bearing here.

- B. Substantial evidence on the whole record supports the Board's finding that the picketing was conducted at a time when Chambers was lawfully recognizing other unions and a question concerning representation could not appropriately be raised under Section 9(c) of the Act.

The Council's picketing for recognition and bargaining violated Section 8(b)(7)(A) if, as the Board further found, at the time of the picketing Chambers was lawfully recognizing other unions and a question concerning representation could not have been raised under the election procedures of Section 9(c) of the Act.

Initially, the Council asserts that Chambers' recognizing and contracting with the locals in early 1965 were unlawful, since until the Council's 1956 memorandum agreement with Chambers expired on November 29, 1965 (see *supra*, pp. 3-4, 5-6), the Council alone was the "exclusi[ve]" representative of the employees (Br. 24-27). This argument — a complete *volte-face* against the defense that the statewide memorandum agreement is only a caretaker agreement for the locals in the area of sub-contracting, and does not establish the bargaining relationship between the Council and general contractors — must be totally rejected on a single ground. As the Trial Examiner noted (R. 15), the Council may not rely on any alleged illegal execution of contracts between the locals and Chambers. Those contracts were executed over a year before the Council's April 1966 picketing, with no unfair labor practice charge having been filed alleging the contracts' illegality on any ground.⁷ The

⁷ The Council's attack on the legality of its locals' contracts is particularly anomalous when viewed against Secretary-Treasurer Horstrup's participation in negotiations and execution of at least one of the locals' agreements with Chambers (*supra*, pp. 3, 4).

6-month limitations period in Section 10(b) of the Act (*infra*, pp. A-5,6) thus barred such a charge and any claim in this proceeding that execution of the contracts established an unlawful bargaining relationship. *International Hod Carriers, etc., Local 1298 (Roman Stone Construction)*, 153 NLRB 659 n. 3; *N.L.R.B. v. Local 3, I.B.E.W., supra*, 362 F. 2d at 236, enforcing 153 NLRB 717, 724-725. See *Local Lodge No. 1424, I.A.M., AFL-CIO v. N.L.R.B. (Bryan Mfg. Co.)*, 362 U.S. 411. As the Board explained in *Roman Stone Construction, supra*, Section 8(b)(7)(A) was "intended in part to promote stability in established bargaining relationships, an interest also served both by the contract-bar rules and by Section 10(b)" of the Act. As the Board reasoned (153 NLRB at 659 n. 3):

To hold, under the conditions presented herein, that an incumbent union's representative status may be placed in issue as a defense to 8(b)(7)(A) charges would permit a rival union to accomplish by means of picketing what it could not achieve under established bargaining procedures. Such an application of 8(b)(7)(A) would offend the very policy which that Section was designed to further. Consistent with the congressional scheme, it is our opinion that the term "lawfully recognized" was meant to include all bargaining relationships immune from attack under Sections 8 and 9 of the Act. Accordingly, and as [the contracting union's] representative status could not be litigated under any other Section of the Act, we [hold] that such testimony could not be adduced in the 8(b)(7)(A) proceeding for the purpose of collaterally attacking [the contracting union's] status as statutory bargaining representative.

The locals' contracts also precluded a question concerning representation at the time of the Council's picketing. Under the Board's "contract bar" rules the Board generally will not conduct an election during the first 3 years of a collective bargaining agreement with a lawfully recognized representative. See *General Cable Corp.*, 139 NLRB 1123. As shown, the Council picketed Chambers when he was a party to contracts with the locals which had been in effect for approximately a year. The Council does not dispute that Congress intended to ban recognitional picketing when a question concerning representation could not be raised by virtue of the contract-bar principles. See, *N.L.R.B. v. Local 3, I.B.E.W.*, *supra*, 362 F. 2d at 236; Cox, *The Landrum-Griffin Amendment to the NLRA*, 44 Minn. L. Rev. 257, 265 (1959).

The Council contends, however, that Section 8(f) of the Act requires the Board to view the locals' contracts as no bar to an election (Br. 27-31). Section 8(f) partially exempts construction industry bargaining contracts from the strictures of Section 8(a)(3) of the Act. The first clause of Section 8(f) allows "prehire agreements" by providing that a contractor's labor agreement with a building trades union shall not be considered unlawful because "the majority status of such labor organization has not been established prior to the making of the agreement" The final proviso to the section provides, however, that "any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a[n election] petition filed pursuant to section 9(c)" (*infra*, pp.A-3, 4). According to the Council, Chambers' contracts with the locals are nominally invalid for lack of majority support when executed, but are prehire agreements validated only by Section 8(f)(1);⁸ hence, it is claimed that the proviso to that section

⁸ Any claim of actual invalid execution is, as shown, barred by Section 10(b) of the Act.

prohibits a finding that at the time of the Council's recognitional picketing a Board election was precluded by the contract-bar doctrine. The Board properly rejected this contention, concluding that the contracts here were not prehire agreements within this statutory framework (R. 34).

As shown, *supra*, p. 4, the record affirmatively shows that Chambers' employees were members of the locals with which Chambers contracted, and his average work force of 25 employees had been union members for many years, as the Council was well aware (see, Tr. 65-66, 131). Moreover, the contracts themselves are *prima facie* evidence of majority support. As stated by the Second Circuit (*N.L.R.B. v. Local 3, I.B.E.W.*, *supra*, 362 F. 2d at 235):

The Board has taken the position that when an employer recognizes a union and executes a collective bargaining agreement with it, a rebuttable presumption arises that the union represents a majority of the employees. *Shamrock Dairy, Inc.*, 119 NLRB 998, 1002 (1957), order enforced *sub nom. International Brotherhood of Teamsters v. N.L.R.B.*, 280 F. 2d 665 (D.C. Cir.), cert. denied, 364 U.S. 892 (1960). We believe that the Board is justified in requiring that a party attacking the legality of an employer's recognition of a union should at least present *prima facie* evidence of illegality. [Footnotes omitted.]

The Council presented no evidence to rebut the proof of majority support thus established by the record. *Cf. N.L.R.B. v. Gulfmont Hotel Company*, 362 F. 2d 588 (C.A. 5). This is not a case, therefore, where the contracts would be unlawful but for the exculpatory language of Section 8(f)(1). Accordingly, the proviso to that section does not apply to prohibit

Chambers' contracts with the locals from operating as a bar to a Board election: the proviso is directed solely at agreements which "would be invalid" but for the first clause in the section. *Island Construction Co., Inc.*, 135 NLRB 13, 14-16; *N.L.R.B. v. Local 3, I.B.E.W.*, *supra*, 362 F. 2d at 236, enforcing 153 NLRB 717, 724-725; *Dallas*, *supra*, 65 LRRM at 1172. Accord: *Houston Chapter, Associated General Contractors of America, Inc., et al.*, 143 NLRB 409, 411, enforced 349 F. 2d 449, 452 (C.A. 5), cert. denied, 382 U.S. 1026.⁹

The legislative history supports the Board's view that a construction industry bargaining agreement entered into by an employer essentially to cover his current and somewhat stable work force comprised of union members, is not a prehire agreement within the intendment of Section 8(f)(1) and the proviso to that section. The statute was amended to permit such agreements where, because of the unique features of the construction industry, a contractor needs a quick source of labor for a temporary period. The contractor may need to arrange for his labor needs and to determine the cost thereof before undertaking the construction contract. Accordingly, Section 8(f)(1) was intended to permit the contractor and the union to enter into a collective bargaining agreement before a representative number, or any, of the affected employees are hired. See I & II Legislative History of the LMRDA of 1959 (GPO 1959), pp. 424-425, 451-452, 777-778, 1067, 1082, 1289, 1577, 1643, 1715, 1830. As explained by then Senator John F. Kennedy,

⁹ *Alton-Wood River Building and Construction Trades Council*, 144 NLRB 260, 262-263, and other cases cited by the Council do not hold to the contrary. In *Alton-Wood*, for example, a prehire agreement was found and the proviso to Section 8(f) held applicable where the employer contracted with the union and told his wholly non-union work force they were "automatically covered"; thereupon, on the employer's suggestion, the employees joined the union.

Section 8(f)(1) permits, contrary to the usual proscription, "a prehire agreement where the majority status of the union had not been established." (*id.* at 1715). Congress thus intended to "sanction * * * pre-hire agreements in the construction industry [when] the majority status of the union cannot be established." *N.L.R.B. v. Local 542, Operating Engineers*, *supra*, 331 F. 2d at 105-106. Accord: *Bricklayers & Masons International Union, Local No. 3, et al.*, 162 NLRB No. 46, petition for enforcement pending, No. 22,337 (C.A. 9).

The considerations premising the grant of this special privilege do not apply when, as here, the contract entered into by a contractor fixes the terms and conditions of his current complement of employees who are members of the contracting union. Rather, in these circumstances the employees, the employer, and the union alike are entitled to the period of stability which the contract-bar doctrine, by precluding an election for a reasonable period of time, normally affords. The Board's determination to apply the doctrine is, we submit, well within the discretion vested in the agency in such matters. See *N.L.R.B. v. Libbey-Owens-Ford Glass Co.*, 241 F. 2d 831, 836 (C.A. 4); *Local 1545, United Brotherhood of Carpenters, etc. v. Vincent, et al.*, 286 F. 2d 127, 131 (C.A. 2).

CONCLUSION

Accordingly, it is respectfully submitted that the petition to review and set aside the Board's order should be denied, and that the Board's order should be enforced in full.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

GLEN M. BENDIXSEN,
Attorney,

National Labor Relations Board.

February 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

* * *

UNFAIR LABOR PRACTICES

* * *

[Sec. 8] (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act, (B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days

from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b).

* * *

[8] (e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided*

further, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms “any employer,” “any person engaged in commerce or an industry affecting commerce,” and “any person” when used in relation to the terms “any other producer, processor, or manufacturer,” “any other employer,” or “any other person” shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities

for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).*

* Section 8 (f) is inserted in the Act by subsection (a) of Section 705 of Public Law 86-257. Section 705 (b) provides:

Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * *

[Sec. 10] (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with

the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in

part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States

Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *

United States
COURT OF APPEALS
for the Ninth Circuit

No. 22169

LANE-COOS-CURRY-DOUGLAS COUNTIES
BUILDING AND CONSTRUCTION TRADES
COUNCIL, AFL-CIO,

v.

Petitioner,

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 22169-A

NATIONAL LABOR RELATIONS BOARD,

v.

Petitioner,

JENS HORSTRUP,

Respondent.

**Case No. 22169 on Petition for Review of An Order
of the National Labor Relations Board**

**Case No. 22169-A on Petition for Enforcement of an
Order of the National Labor Relations Board**

PETITIONER'S REPLY BRIEF IN CASE NO. 22169

PAUL T. BAILEY
STEPHEN M. MALM
BAILEY, SWINK AND HAAS
617 Corbett Building
Portland, Oregon 97204
Attorneys for Petitioner

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PETITIONER'S REPLY BRIEF IN CASE NO. 22169

**REPLY TO THE NATIONAL LABOR RELATIONS
BOARD'S COUNTERSTATEMENT OF THE CASE**

The National Labor Relations Board's (herein-
after "Board") counterstatement of the case infers

that the Oregon State Building and Construction Trades Council Articles of Agreement (G.C. Ex. 18)¹ somehow govern the relationship between R. A. Chambers & Associates (hereinafter "Chambers") and its own employees. A reading of the plain language of the Articles of Agreement establishes beyond question that nothing could be further from the actual fact as to its tenor or intent.

Contrary to the Board's inference, the Articles of Agreement are designed exclusively to deal with problems relating to the contracting and subcontracting of work by an employer. They involve only the relationship of one employer with another and do not in any way attempt to govern or regulate matters affecting an employer's relationship with his own employees. The petitioner, Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council (hereinafter "Council") has no interest in or intent of being recognized as the bargaining representative of any employer's employees or altering a particular employer's relationship with his own employees. (See Op. Br. pp. 13-14, 16-17 for extended discussion.)

Furthermore, the Articles of Agreement (G.C. Ex. 18) do not overlap or contradict the terms of local craft union agreements (see G.C. Exs. 12-15) in any manner which could conceivably lead to the conclusion that picketing by the Council to obtain the

¹ Tr. refers to Reporter's Transcript. Cr. refers to Clerk's record of pleadings. Op. Br. refers to the opening brief of the petitioner, Lane-Coos-Curry-Douglas Counties Building Trades Council. Ans. Br. refers to answering brief of the National Labor Relations Board.

Agreement has as an object recognition or representation of Chambers' own employees. This matter is discussed more fully in the Council's argument, *infra* pp. 3-9, and in the Council's opening brief, (Op. Br. pp. 18-21). The Board's extensive discussion (Ans. Br. 5) of supposed inconsistencies between the Articles of Agreement and local craft union agreements does not support its case.

Finally, the record unequivocally fails to supply a basis for the Board's statement (Ans. Br. 4) that all of Chambers' employees were local union members when Chambers executed agreements with various local craft unions. No objective evidence had ever come to Chambers' attention indicating with certainty that his employees were or were not union members. At best, he was only guessing as to their status. (Tr. 130-131). No other witness provided any further or more concrete evidence concerning the matter.

ARGUMENT

I

The Council's picketing was not for the purpose of recognition or bargaining.

Initially, the Board's brief does not deny the Council's proposition that it and other building trades councils throughout the nation, both historically and in the current situation, are concerned solely with the relationships between various employers in the industry as regards the contracting and subcontracting of work (See Op. Br. pp. 11-14). The Council is not

formed or operated for the purpose of seeking recognition as the bargaining agent or representative of employees in the building and construction industry. Likewise, the provisions of the Articles of Agreement (G.C. Ex. 18), which the Council sought to have Chambers execute, neither create nor infer any purpose on the part of the Council that Chambers should bargain with it as the representative of its employees.

The Board's error in asserting otherwise results from its failure to recognize the distinction between contract provisions limiting the actual right of an employer to subcontract work (e.g. union-standards subcontracting clauses such as those found in local craft union agreements (G.C. Ex. 12-15), and contract provisions which merely limit the persons or business entities to whom the employer may subcontract work (e.g. union-signatory subcontracting clauses such as that found in Para. IV of the Articles of Agreement, G.C. Ex. 18). The former contract provisions are primary and designed to establish terms and conditions of employment in the principal employer's work unit, while the latter are secondary and affect only the principal employer's relationship with other employers through limitations on the subcontracting of work. See *Truck Drivers Local 413 v. NLRB*, 334 F.2d 182 (D.C. Cir. 1964) and *Orange Belt District Council of Painters, No. 48 v. NLRB*, 328 F.2d 534 (D.C. Cir. 1964) for a detailed discussion of this distinction.

The subcontracting clause in the Articles of

Agreement (Para. IV, G.C. Ex. 18) is of the latter, secondary type, not defining a collective bargaining unit or attempting in any way to determine the terms and conditions of employment under which Chambers' own employees might work. Its only purpose is to regulate Chambers' relationship with other employers in the building and construction industry, a purpose totally distinct and independent from that of the local craft unions which attempt to preserve terms and conditions of employment among Chambers' own employees by including primary, union-standard subcontracting clauses in the local craft union agreements such as G.C. Exs. 12-15. Therefore, since the subcontracting clause of the Articles of Agreement does not in any sense influence Chambers' relations with his own employees, or intrude on Chambers' bargaining relationship with local unions, picketing by the Council to obtain Chambers' execution of the Agreement neither expressly nor inferentially created a purpose on the part of Council to be recognized as the bargaining representative of those employees.

The Board has expressly recognized the validity of the distinction drawn here by its decision in *Blinne Construction Co.*,² 135 NLRB No. 121, 49 LRRM 1638 (1962) (f.n. 29), a case involving picketing un-

² In *Blinne*, the board discussed at length both the theory and application of Sec. 8(b)(7). Its language and analysis are, contrary to the Board's position (Ans. Br. 17, f.n. 6), highly relevant to this case. It is accurately and appropriately cited by Council, both here and in its opening brief, as authority for the proposition it supports.

der Sec. 8(b)(7) of the Labor-Management Relations Act, as amended (29 U.S.C. Sec. 158(b)(7)) (hereinafter the "Act"), where it stated:

"... we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and organizational picketing and other forms of picketing, thereby recognizing as we recognize, that a real distinction does exist."

The fact that the Council has attempted to obtain Chambers' execution of the Articles of Agreement does not establish a purpose on the Council's part to be recognized as the agent of Chambers' employees. A labor organization such as the Council may clearly deal with employers concerning the subcontracting of work as well as other matters outside the traditional scope and nature of matters involving wages, hours and working conditions and not be subject to the prescriptions of Sec. 8(b)(7). *IBEW, Local 903*, 154 NLRB No. 10, 1965 CCH NLRB 9600.³

Using the precise language of the National Labor Relations Act, the Council, "dealing with" Chambers

³ This case and *Bldg. and Const. Trades Council*, 141 NLRB No. 2, 52 LRRM 1269 (1963), unlike the Board's suggestion (Ans. Br. 16-17, f.n. 5, 6), are not distinguishable on their facts from the instant case. Picketing in those cases was carried out to prevent the use of non-union signatory subcontractors by a general contractor. Picketing in the present case was for the purpose of obtaining an agreement to prevent the use of non-union signatory subcontractors. In neither those cases nor the instant case did the trades council involved have any intent of representing the general contractor's employees. If there is a distinction, it is one without a difference.

over matters relating to the subcontracting of work, was not engaging in the much more limited field of "bargaining" as the representative of Chambers' employees. See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 79 S. Ct. 1015 (1959).

Secondly, the Board's contention that Paragraph IX of the Articles of Agreement (G.C. Ex. 18) is somehow inconsistent with the no-strike and picketing provisions of the local craft union agreements (Ans. Br. 5, 11) has no support in the language of those agreements. Paragraph IX of the Articles of Agreement establishes various circumstances under which it will not be a violation of the Agreement for an employee to refuse to perform work or cross a picket line. But the Articles of Agreement nowhere list or preclude the possibility that such a refusal might be in violation of the terms and conditions of a local craft union agreement. The Articles of Agreement in no way hinder the freedom of individual employers and local craft unions to agree on no-strike commitments or commitments to furnish workers as they might see fit. No inference that the Council seeks recognition is created by Paragraph IX of the Articles of Agreement.

Because the Articles of Agreement have no recognition or organization object, the fact that they can be amended only with approval of the Council (see Paragraph X) does not impede bargaining or the bargaining relationship between Chambers and the local unions representing his employees. This provi-

sion (Paragraph X) fails to support the Board's contention that an object of recognition exists.

Sec. 8(b)(7) of the Act (29 U.S.C. Sec. 158(b)(7)) proscribes picketing only where an object thereof is recognition by the picketing labor organization as the representative of an employer's employees, *NLRB v. Local 3, IBEW*, 362 F.2d 232 (2d Cir. 1966). Neither the inherent nature of the Council, the terms of the Articles of Agreement which it was seeking to have Chambers execute, nor any evidence in the record of this case supports the proposition that any such object of recognition exists here. Any shadow of prima facie evidence (Ans. Br. 9), which the Council's demand for execution of the Articles of Agreement may have created, is clearly overcome by the evidence before this Court and the plain language of the Agreement itself.

The case of *Centralia Building and Construction Trades Council v. NLRB*, 363 F.2d 699 (D.C. Cir. 1966) is cited by the Board in support of its position (Ans. Br. 9-10). Quite to the contrary, the reasoning of the Board in the *Centralia* decision adds merit to the Council's position. In that case, the building trades council picketed to obtain the employer's execution of an agreement requiring payment of certain wages and fringe benefits to his own employees. This is precisely the situation that Sec. 8(b)(7) was designed to regulate. The Council and the Articles of Agreement in the instant case have no such purpose. The only effect of the Articles of Agreement here is

to regulate matters concerning Chambers and other employers in the industry. The *Centralia* case points up and supports the very distinction that the Council is asserting.

Picketing by the Council was entirely consistent with the policy of preserving to employees freedom of choice in the selection or rejection of bargaining representatives, which is the basis for the enactment of Sec. 8(b)(7). The historically recognized role of building and construction trades councils as a coordinator of activities in the construction industry (see Op. Br. 11-14) strengthens, rather than subverts, the stability and tranquility in labor relations which Sec. 8(b)(7) was designed to achieve.

II

The Council's picketing was conducted at a time when Chambers had not lawfully recognized any other union, and a question concerning representation could appropriately be raised under Sec. 9(c) of the Act.

In National Labor Relations Board proceedings, an employer charging that Sec. 8(b)(7)(A) has been violated must establish that he has lawfully recognized another labor organization as the bargaining representative of his employees, *NLRB v. Local 3, IBEW*, 362 F.2d 232 (2d Cir. 1966). The Board would now suggest (Ans. Br. 18-19) that because six months has passed since Chambers executed agreements with various local craft unions, Chambers is suddenly excused from carrying this statutory bur-

den of proof. While the six months statute may certainly apply for the limited purpose of precluding the Council from questioning the majority status of the local unions as regards the illegality of an employer's activity, the Board decisions on this question⁴ have never held that this relieves the employer of the duty of displaying evidence that he has lawfully recognized another labor organization. If Congress had intended that the burden of proving lawful recognition in Sec. 8(b)(7)(A) proceedings be set aside in cases similar to the one now before the Court, it would have expressly placed such an exception in the language of the Labor-Management Relations Act.

This is precisely the thrust of the Council's argument. If one assumes for the moment, without admitting, that the Council, under the 1956 Building Trades Agreement (Resp. Ex. 4) executed with Chambers, was the bargaining representative of Chambers' employees, then not only has the Board failed to prove that Chambers lawfully recognized the local craft unions, but the record establishes quite clearly that only the Council was the lawful representative. Its labor agreement with Chambers did not terminate until after Chambers had executed the local craft agreements (See Op. Br. 24-25).

On the other hand, it is perfectly acceptable for the Council to raise the fact the record fails to establish that a majority of Chambers' employees were un-

⁴ See particularly Local 7463, UMW, 160 NLRB No. 129, 63 LRRM 1173 (1966) and International Hod Carriers, Local 1298, 153 NLRB No. 58, 1965 CCH NLRB 9506.

ion members at the time agreements were executed with the local crafts, when the Council's only purpose in doing so is to show that those contracts were simply pre-hire agreements made lawful only by Sec. 8(f) of the Act. See *Alton-Wood River Bldg. Trades Council*, 144 NLRB No. 31, 54 LRRM 1040 (1963). The majority status of Chambers' employees as union members had not been established at the time agreements were executed with the local crafts (*supra* p. 3 and Op. Br. 37-38). Therefore, those contracts were pre-hire agreements which, under Sec. 8(f), are not a bar to the raising of a question concerning representation under Sec. 9(c) of the Act, *McLeod v. Electrical Workers (IBEW) Local 3*, — F. Supp. —, 57 LRRM 2052 (S.D.N.Y. 1964); *Island Construction Co.*, 135 NLRB No. 1, 1962 CCH NLRB 10,820. Because a question concerning recognition could be raised at the time the Council was engaged in picketing at Chambers' construction site, the picketing did not and could not violate Sec. 8(b)(7)(A), *General Truck Drivers, Warehousemen & Helpers, Locals 980 & 624*, 158 NLRB No. 103, 62 LRRM 1153 (1966).

For the purpose of determining whether a question concerning representation could be raised under Sec. 9(c) of the Act, mere execution of local craft union agreements by Chambers did not raise a rebuttable presumption at all as to the union-member majority status of its employees. The presumption asserted by the Board (Ans. Br. 21-22) arises only where the legality of an employer's recognition of a

union is placed in issue. Those cases⁵ relied upon by the Board (Ans. Br. 21) concern only the "lawful recognition" portion of Sec. 8(b)(7)(A) and expressly state that the sole basis for the presumption is that a party attacking the legality of an employer's recognition of a union should be required to establish that illegality.

On the other hand, the Council here raises the question of majority status, not to refute the legality of Chambers' craft union agreements, but only to show that legal or not, the local agreements were executed solely under authority of Sec. 8(f) and do not prevent the raising of a question concerning representation. Under the circumstances of the present case, the basis and reason for the presumption do not exist. In *Alton-Wood River Bldg. Trades Council*, 144 NLRB No. 31, 54 LRRM 1040 (1963), the Board was concerned as the Court is here only with the matter of whether a question concerning representation could be raised under Sec. 9(c) of the Act. No such presumption was raised.

⁵ *NLRB v. Local 3, IBEW*, 362 F.2d 232 (2d Cir. 1966) and *Shamrock Dairy, Inc.*, 119 NLRB No. 134, 41 LRRM 1216 (1957).

CONCLUSION

For these reasons, and those set forth in Council's Opening Brief, it is respectfully submitted that the Court find the Council's activity was not in violation of Sec. 8(b)(7)(A) of the Act and that the decision of the National Labor Relations Board be reversed.

BAILEY, SWINK & HAAS
PAUL T. BAILEY
STEPHEN M. MALM
Of Attorneys for the Petitioner
617 Corbett Building
Portland, Oregon 97204

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL T. BAILEY
Of Attorneys for the Petitioner

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

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v.

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On Petition To Review and Set Aside, Cross-Petition
for Enforcement and Petition for Enforcement
of an Order of the National Labor Relations Board

**BRIEF FOR BUILDING AND CONSTRUCTION TRADES
DEPARTMENT, AFL-CIO, AMICUS CURIAE**

LOUIS SHERMAN
LAURENCE J. COHEN
1200 15th Street, N. W.
Washington, D. C. 20005
*Counsel for Building and
Construction Trades Department,
AFL-CIO, Amicus Curiae*

Of Counsel:

SHERMAN AND DUNN

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 22169 and 22169-A

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

JENS HORSTRUP, *Respondent*

**On Petition To Review and Set Aside, Cross-Petition
for Enforcement and Petition for Enforcement
of an Order of the National Labor Relations Board**

**BRIEF FOR BUILDING AND CONSTRUCTION TRADES
DEPARTMENT, AFL-CIO, AMICUS CURIAE**

I. PRELIMINARY STATEMENT

The determination of the issues before the Court in the instant case will have a substantial impact upon the rights of approximately three million building and construction tradesmen who are represented by local unions whose eighteen international unions are affiliated with this Department. The issue, as it affects them and the local and international unions and building trades councils with

which they are affiliated, is whether the councils may apply economic pressure to obtain subcontracting agreements which they are authorized to enter into under Section 8(e) of the National Labor Relations Act, as amended. The interest of the Department in this case arises from the novel approach of the Board in utilizing Section 8(b)(7) in a manner which is directly contrary to the language of the Act and its legislative history so as to proscribe what has been traditionally considered to be lawful activity on the part of local building trades councils affiliated with the Department.

The Department accepts the Council's statement of the case and fully supports its position with respect to the substantive issues before this Court.

II. ARGUMENT

A. The Board's Holding is not Supported by Either the Language of Section 8(b)(7) or the Applicable Legislative History.

In its decision at 165 NLRB No. 86, the Board found that the picketing here in issue had "an object of recognition and bargaining within the meaning of Section 8(b)(7)."¹ The Board's conclusion was founded on the reasons set forth in its decision in *Dallas Building and Construction Trades Council*, 164 NLRB No. 139, a case presenting substantially the same issues as the instant one. In *Dallas*, the Board was a little more specific in defining the nature of the alleged violation of Section 8(b)(7). There, the Board found that the Council picketed "with an object to force these employers to accept the Council's subcontracting clause, at a time when the employers had lawfully recognized and were bound to collective-bargaining agreements with other unions representing their employees."² Upon

¹ Board's decision, at p. 2.

² *Dallas Building and Construction Trades Council*, *supra*, at p. 10.

this finding, the Board then superimposed the further finding that the Dallas Council's object in obtaining the subcontracting agreement there was "to represent and bargain for the employees of the employers involved as to subcontracting, within the meaning of Section 8(b)(7)(A)."³

It may be well at this point to compare the above findings of the Board with the specific statutory language in question. Section 8(b)(7) makes it an unfair labor practice for a labor organization or its agents:

"(7) To picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization *as the representative* of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified *as the representative* of such employees. . . ." (Emphasis supplied.)

As the question of "organizational" picketing is not involved in this case, the only issue presented is whether the Council's conduct had the object of forcing or requiring the contractor involved to recognize or bargain with it herein as "the representative" of its employees. In other words, the narrow issue before the Court is the meaning and scope of "recognitional" picketing.

For the reasons discussed below, the Department submits that the recognitional object prohibited by Section 8(b)(7) is recognition as the *exclusive* bargaining representative of the employees in question, within the meaning of Section 9 of the Act. In its decision, however, the Board simply disposes of the case under the general designation of "an object of recognition," without examining the type of recognition intended by the Congress to be proscribed under Section 8(b)(7). But, this will not suffice. As Mr. Justice

³ Id. at 11.

Frankfurter cautioned in the famous *Sand Door* case, *Local 1976, U.B.C.J. v. NLRB*, 357, U.S. 93, 98 (1958):

“The section [8(b)(4)] does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives.”

So it is here; Section 8(b)(7) does not outlaw “recognition” picketing. It outlaws only picketing or threats to picket with an object of forcing an employer to recognize and bargain with a labor organization as “*the* representative of his employees, . . .” (Emphasis supplied.) That this statutory reference is to recognition as the exclusive bargaining representative is evidenced by the language of Section 8(b)(7) and its subsections. Thus, as noted above, the language of the section refers to “*the*” representative.⁴ Moreover, an exception to the prohibition occurs where the labor organization is “currently certified as the representative;” an unmistakable reference to the machinery of Section 9 of the Act for the selection of the “exclusive representatives.” Also unmistakable is the parallelism in the dual use of the phrase, “as the representative,” and the import of the requirement of certification in the second instance. In addition, each of the subsections (A)-(C) refers specifically to Section 9(c).

The relevance of Section 9 to Section 8(b)(7) has previously been noted in some detail by the District of Columbia Circuit, which has held that the purpose of Congress in passing the latter was “the encouragement of elections under the aegis of the Board. . . .” *Dayton Typographical*

⁴ The Board cannot, therefore, successfully substitute, in words or effect, “a” bargaining representative for the singular article, “the,” chosen by the Congress. The two articles are no more interchangeable with respect to “the representative” in Section 8(b)(7) than they are with respect to “an object” in Section 8(b)(4). See *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951). The essential point is that Congress was aware of the difference and, in each instance, used that article which expressed its specific intent.

Union No. 57 v. NLRB, 326 F. 2d 634, 646 (D.C. Cir. 1963). See also in this regard the Board's own decision in *International Hod Carriers Local 840 (Blinne Construction Company)*, 135 NLRB 1153, 1162.

Thus, the language of the Act itself demonstrates the requirement that, for the Board to find a violation of 8(b)(7), the labor organization involved must be seeking recognition as *the* exclusive bargaining representative of his employees within the meaning of Section 9. And, not only was no such finding made by the Board below; no such finding is possible under the facts and circumstances of this case.

If, however, any doubt remains concerning the scope of the prohibition of Section 8(b)(7), that doubt is dispelled by an examination of the legislative history. Senator Kennedy, reporting to the Senate on the agreement of the Conference Committee, discussed that section in the context and traditional jargon of Section 9 procedures as follows:

“The amendments adopted in the conference secure the right to engage in all forms of organizational picketing *up to the time of an election* in which the employees can freely express their desires with respect to the *choice of a bargaining representative*.” Cong. Rec. September 3, 1959, p. 16402; Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Government Printing Office, 1959, cited herein as Leg. Hist.), Vol. II, p. 1431. (Emphasis supplied.)

He added, “. . . the prohibitions relate only to picketing in an effort to organize employees or secure recognition *in a bargaining unit covered by the existing contract or the prior election*.” Cong. Rec., September 3, 1959, p. 16415; II Leg. Hist. 1433 (Emphasis supplied.)

That the Congress, in referring to recognition “as the representative” of an employer's employees in Section 8(b)(7) was referring to recognition as the exclusive bargaining representative under Section 9 of the Act is demon-

strated even more explicitly by the minority counsel for the Senate Labor Committee, who was in attendance at the Conference Committee meetings. An interview with the counsel, Michael Bernstein, was printed in the Congressional Record by Senator Goldwater and appears in the official Legislative History, beginning at page 1827 of Volume II. At 1828, in discussing the concept of "recognition" picketing, Mr. Bernstein observed that:

"Now, the law says that, when a majority of them [the employees] pick a union to act as a bargaining agent, that bargaining agent so selected becomes the exclusive representative of all the employees, not just those who voted for the union or who belong to it."

Then, as an example of the forbidden "recognition" picketing, Mr. Bernstein gives this example:

"Suppose an employer whose employees don't want the union—or the majority of them don't—has a picket line thrown around them, and the union says, 'We want you to sign a contract with us.' he says, 'Well, I can't. I violate the law if I do that. My employees don't want your union, and you don't represent a majority, and, therefore, I am prohibited by law.'" *Ibid.*

Finally, and more explicit still, the Department's position in this regard is supported by the legislative history concerning the enactment of Section 8(b)(4)(B) of the Act, in 1947. That Section prohibited—and still prohibits under the 1959 Amendments—certain activity with an object of, "forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such organization has been certified as the representative of such employees under the provisions of Section 9; . . ." Note that Section 8(b)(4)(B), as well as Section 8(b)(7), uses the phrase "the representative of his employees." House Conference Report No. 510, on H.R. 3020, discussed the Senate Amendment—which was adopted

—concerning Section 8(b)(4)(B), as follows:

“Clause (B) of this provision of the Senate amendment covered strikes and boycotts conducted for the purpose of forcing another employer to recognize or bargain with a labor organization that has not been certified as *the exclusive representative*.”⁵ (Emphasis supplied.)

In short, the Congress has consistently understood and intended, in both the 1947 and the 1959 amendments to the National Labor Relations Act, that the stated phrase, “the representative,” refers to “the exclusive representative.”

Curiously enough, the Board itself once recognized that the concept of recognitional picketing meant picketing “for the purpose of compelling the Company to extend *exclusive recognition* to it, . . .” (Emphasis supplied.) *Drivers, Chauffeurs, and Helpers Local 639, International Brotherhood of Teamsters, Etc. (Curtis Brothers, Inc.)*, 119 NLRB 232, 234. Subsequently, the Supreme Court, in rejecting the Board’s substantive holding in *Curtis Brothers*, stated the nature of the “recognitional” picketing in issue as, “. . . picketing designed to induce Curtis Bros. to recognize the Local as the exclusive bargaining agent for the employees, although the union did not represent a majority of the employees.” *N.L.R.B. v. Drivers Local Union*, 362 U.S. 274, 277. We find it surprising that the same agency which could “invent” its *Curtis Brothers* doctrine, while at the same time acknowledging the only realistic interpretation of the concept of recognitional picketing, has now chosen to discard the latter along with the former.

In sum, the Department respectfully submits that the unlawful recognitional object in Section 8(b)(7) refers solely to seeking recognition as the exclusive bargaining representative within the meaning of Section 9 of the Act. As

⁵ House Conf. Rept. at 43; Leg. Hist. of the Labor-Management Relations Act, 1947 (Government Printing Office, 1948), Vol. 1, at page 547.

such, and for the reasons set forth in the Council's brief, the picketing herein had no such object and could have had no such object. As was stated over a decade ago by Judge Learned Hand:

"When Congress limited the wrong to occasions when the cessation was an 'object' to the conduct, it excluded much indeed that the ordinary law of tort would have included. If it had not done so, it would have made nearly all strikes unlawful. The 'object' of an action is the concluding state of things that the actor seeks to bring about: that which satisfies his aim." *Douds v. International Longshoremen's Association*, 224 F.2d 455, 459 (2nd Cir. 1955).

It cannot seriously be contended that the Council's object herein was to obtain recognition as the exclusive bargaining representative of the employees of the contractor involved. Yet, this is the net effect of the Board's holding, particularly since it has itself recognized that, "... the provisions of the statute [Section 8(b)(7)] mean conventional bargaining and recognition. . . ."⁶

Section 13 of the Act presents still another bar to the result reached below. And, in this regard, the Board's unwarranted expansion of the scope of Section 8(b)(7) runs directly counter to the Supreme Court's admonition that:

"... Section 13 declares a rule of construction which cautions against an expansive reading . . . which would adversely affect the right to strike, unless the congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, Section 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike as understood prior to the passage of

⁶ *International Brotherhood of Electrical Workers, Local Union No. 903 (Pass Development, Inc.)*, 154 NLRB 169, 176. That decision is also noteworthy for a more realistic appraisal of the object of the picketing there in question than that utilized in the instant case. See further, Section B, *infra*.

the . . . Act." *NLRB v. Drivers Local Union, supra*, at 282.

The Department has submitted herein that the language and legislative history of Section 8(b)(7) reveal the limited scope intended by the Congress. At the very least, however, it seems clear that no congressional purpose supporting the Board's "expansive" interpretation of the Section "persuasively appears either from the structure or history of the statute."

B. The Board's Interpretation of Section 8(b)(7) is Incompatible with the Practical Realities of Construction Industry Labor Relations Recognized by the Congress in 1959.

The Board's superficial approach to Section 8(b)(7) totally disregards the realities of construction industry labor relations and the traditional pattern of bargaining in that industry. The craft unions have customarily entered into collective bargaining agreements covering wages, hours and working conditions of the employees they represent in the particular trade, while the local building trades councils with which they are affiliated have sought agreements dealing with problems on job projects which are of general interest to all trades, particularly subcontracting conditions. Indeed, the Congress recognized these traditional bargaining patterns in the construction industry and granted authorization for their continuance by virtue of the new provisions added to the Act in 1959 in Sections 8(e) and 8(f). Even though the Congress saw fit to authorize the making of jobsite subcontractor agreements in the construction industry in the first proviso to Section 8(e), the Board now seeks to nullify the effectiveness of that provision by virtue of its strained interpretation of Section 8(b)(7). Totally apart from all other considerations discussed herein, it is absurd to attribute to Congress the intention of taking away from the scope of traditional construction industry bargaining through Section 8(b)(7)

that which it authorized in Sections 8(e) and 8(b)(4). And, despite any protestations by the Board to the contrary, this is precisely the effect of the Board's holdings in this case and *Dallas*. Yet, under this interpretation, one is hard-pressed to find the harmonious scheme between sections of the same statute which Congress is generally presumed to intend in enacting legislation.

Agreements such as that sought by the Council herein are designed to exist side by side with the bargaining agreements already entered into by the individual craft unions. The two types of agreements involved in this case represent the customary and historic division of functions between building trades councils and member craft unions in the construction industry. The critical distinction is that the craft agreements are employee oriented, while agreements such as that sought by the Council are subcontractor oriented; a distinction recognized on an earlier occasion by the Board. *IBEW Local 903, supra*.

Professor John T. Dunlop of Harvard University, in a careful analysis of the special conditions existing in construction industry labor relations, also drew attention to this distinction and to the particular need for subcontractor agreements in that industry:

"The labor organizations traditionally have been interested as much, if not more so, in organizing contractors as organizing workers on a particular project. The project is of short duration, and men often have to be organized again on another job; but the signing of a contractor to an agreement means that in the future, work will be bid, started, and performed under union conditions, and workers will be hired through the hiring procedures established under the agreement. The approach to individual workers is seen as a separate problem from signing up contractors."⁷

⁷ Dunlop, *The Industrial Relations System in Construction, The Structure of Collective Bargaining*, 255, 261 (A. Weber, ed. 1961).

The mistaken assumption underlying the Board's decision is that the construction industry is like all others, in that all conditions affecting a group of employees are governed solely by a single bargaining relationship between the local union representing the employees and a specific contractor, and that no other bodies may intrude into or overlap that relationship. While the assumption may have validity in other industries, it is simply at odds with the existing realities of the construction industry. Professor Dunlop discussed in some detail the various bargaining relationships which exist side-by-side and overlap one another in the industry, all affecting in some way the employees at the lowest tier of the bargaining structure. In general, he groups these levels of bargaining as nationwide for all major branches, e.g., the National Joint Board for the Settlement of Jurisdictional Disputes in the Building and Construction Industry; nationwide for particular branches, e.g., International agreements and such bodies as the Industrial Relations Council which has existed since 1919 between the International Brotherhood of Electrical Workers, AFL-CIO, and the National Electrical Contractors Association; area-wide or locality-wide for all major branches; area-wide or locality wide for particular branches; and project-wide for all branches or for single crafts.⁸

To cite a specific example of such overlapping coverage, a local union of the IBEW may have a collective bargaining agreement with a local contractor anywhere in the United States governing the wages, hours and working conditions of the latter's employees. If those parties cannot reach agreement in contract negotiations, the matters in dispute may be referred to the Council on Industrial Relations, established by International agreement between the parent International Union and the national association of which the local contractor is a member. Or, if a jurisdictional

⁸ Id. at 263 *et seq.*

dispute develops between that local and another local union affiliated with a different international member of this Department, that dispute may be resolved by the National Joint Board, pursuant to the Constitution of the Department or other local and area-wide agreements requiring the resolution of such disputes by the Joint Board. Thus, the actual conditions under which the employees of the contractor work may be governed not only by the local agreement between their employer and local union, but by a variety of agreements and bodies, of different scope and subject matter, established by the parent and affiliated organizations of both their union and employer.

It is respectfully submitted that the Board's decisions in this case and *Dallas* have totally ignored the interrelationship among the local unions signatory to the agreement with the Eugene Contractors Association and the Council. The Board has treated the Council as a separate, distinct and hostile labor organization when, in fact, it is merely an alter ego for the local unions involved in this case. Each of the local unions is an affiliate of an international union which, in turn, is an affiliate of the Building and Construction Trades Department, AFL-CIO. The Department was established pursuant to a resolution at the 1907 Norfolk, Virginia, Convention, which appears as a Preamble to the Constitution of the Department, and which provided:

“That a Department of Building Trades of the A.F. of L. be created, said Department to be chartered by the A. F. of L., and to be composed of bona fide national and international building trades organizations, duly chartered as such by the A. F. of L.; and to be given autonomy over the building trades, with authority to issue charters to local building trades; said sections and central bodies to be affiliated with the A. F. of L. *to be composed of bona fide local unions and recognized as such in the building trades.*” (Emphasis supplied.)

The Council in the instant case is chartered by the Department in accordance with the provisions of the Constitution

and for the object as stated in Article II of said Constitution:

“7. To encourage the formation or establishment of Local Building and Construction Trades Councils in order to aid and assist in the organization and development and *to coordinate the activities of building and construction unions on craft or trade lines.*” (Emphasis supplied.)

Thus, with respect to the scope of recognition or organizational picketing under Section 8(b)(7), the Council and its constituent local unions cannot be considered as separate and distinct labor organizations either as a matter of law or historical fact.

It is further submitted that the Council, in its effort to establish a clause under the Section 8(e) proviso of the Act, which was a matter of mutual and common interest to all the locals of the Council, did not have as an object the acquisition of recognition rights within the meaning of Section 8(b)(7). The Board has repudiated decisively the theory in *Lewis Food Company*, 115 NLRB 890, that, “any strike or picketing in support of a demand which could be made through the process of collective bargaining was a strike or picketing for recognition or bargaining.” *Blinne Construction Company, supra*, at 1168, fn. 29. The Board there recognized the difference between abstractions and contractual intent when it stated that:

“We might well concede that in the long view all union activity, including strikes and picketing, has the ultimate economic objective of organization and bargaining. But we deal here not with abstract economic ideology. Congress itself has drawn a sharp distinction between recognition and organization picketing and other forms of picketing, thereby recognizing, as we recognize, that a real distinction does exist.”

In this connection it may be well to note *Building and Construction Trades Council of Santa Barbara County*,

AFL-CIO, 146 NLRB 1086, 1087, where the Board stated that:

“Thus, by attributing a bargaining objective to the Respondent’s picketing and by resorting to a strictly literal construction of the statute, it is arguable that the picketing falls within Section 8(b)(7)’s prohibition against picketing to force an employer ‘*to recognize or bargain with* a labor organization as the representative of his employees.’ Nevertheless, after analyzing the overall congressional purpose behind the enactment of this section, we are convinced that the words ‘recognize or bargain’ were not intended to be read as encompassing two separate and unrelated terms. Rather, we believe they were intended to proscribe picketing having as its target forcing or requiring an employer’s initial acceptance of the union as the bargaining representative of his employees. When viewed in this posture, it is clear that Sullivan had recognized and extended bargaining rights to the Respondents long before the disputed picketing commenced here and that such picketing therefore was not designed to attain those statutory objectives.’ (Emphasis in original.)

It is thus clear that, when a realistic evaluation of the interrelationship between the Council and its constituent local unions is made, the labor activity here involved did not present a case where one union is seeking to gain recognition where another has been lawfully recognized. (This, of course, is *a fortiori* if the Court accepts the view of the Council in its brief that Chambers did not abandon his agreement with the Council and, therefore, was under a duty to bargain with it.)

It is also clear, on any interpretation of the facts in this case, that the Council did not have as an object the organization of the employees who were already members of its constituent locals.

It may be that the effort of the Council to secure a clause valid under Section 8(e) was in part a violation of Section 8(b)(3), insofar as it affected those locals which had bargained for such a clause in their separate negotiations with

the Eugene Contractors Association and had abandoned the effort in return for concessions on other points. This question, however it should be resolved, is not presented by this case, since no charge of violation of Section 8(b)(3) was made. In any event, proof of violation of Section 8(b)(3) (which was not charged) obviously does not constitute proof of violation of Section 8(b)(7), which is the sole issue in this case.

It is ironic that the Board, with more than thirty years' experience and expertise in the labor relations field, appears to be less cognizant of existing realities in this industry than the other branches of the Government with their very diverse responsibilities. We have referred above to the special recognition accorded the problems of the construction industry by the Congress in 1959. Unions and employers in this industry have had to look also to the judicial branch for relief from Board doctrines which are inconsistent with the intent of Congress. Shortly after passage of the 1959 amendments, the Board issued its *Colson and Stevens* decision,⁹ in which it found that picketing to obtain a subcontracting agreement lawful under Section 8(e), violated Section 8(b)(4)(A) of the Act. In that and several following cases, the unions involved sought review of the Board orders, believing the Board's *Colson and Stevens* doctrine to be at odds with the plain language of the Act and the legislative intention of its drafters. Not until the United States Court of Appeals in three different Circuits had rejected that doctrine, did the Board abandon it.¹⁰ Now,

⁹ *Construction, Production & Maintenance Laborers Union Local 383, AFL-CIO*, 137 NLRB 1650.

¹⁰ *Construction, Production & Maintenance Laborers Union, Local 383, et al. v. N.L.R.B.*, 323 F.2d 422 (9th Cir. 1963); *Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters, etc. v. N.L.R.B.* 332 F.2d 636 (3d Cir. 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. v. N.L.R.B.*, 328 F.2d 534 (D.C. Cir. 1964); *Building and Construction Trades Council of San Bernardino and Riverside Counties, et al. v. N.L.R.B.*, 328 F.2d 540 (D.C. Cir. 1964).

once again, the Board has formulated a doctrine which is inconsistent with the language of the Act and its legislative history, as well as the realities of the industry involved.

III. CONCLUSION

The Council's picketing is not organizational picketing within the meaning of Section 8(b)(7) because it did not attempt to organize any employees to join the Council as a labor organization. Nor is any contention made to that effect. The Council's picketing is not recognitional picketing within the meaning of that Section because it was not seeking recognition by Chambers as the exclusive bargaining representative of its employees; the only form of recognitional picketing proscribed by Section 8(b)(7). Rather, the picketing below had as its only object the obtaining of subcontractor agreements; an object specifically permitted by Sections 8(e) and 8(b)(4)(A) of the Act. Such object is not unlawful under Section 8(b)(7) or any other section of the Act. The Board's decision to the contrary constitutes an erroneous interpretation of the plain language of the Act and its legislative history, is incompatible with the realities of bargaining in the construction industry and should, therefore, be reversed.

For all of the foregoing reasons, and those presented in the Council's brief, the Department respectfully submits that this Court should deny enforcement of the Board's Order and order the complaint dismissed in its entirety.

Respectfully submitted,

LOUIS SHERMAN

LAURENCE J. COHEN

1200 15th Street, N. W.

Washington, D. C. 20005

*Counsel for Building and
Construction Trades Department,
AFL-CIO, Amicus Curiae*

Of Counsel:

SHERMAN AND DUNN

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAURENCE J. COHEN

22170

NO. ~~47143~~

United States
Court of Appeals
for the Ninth Circuit

JAMES CARLTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLEE

SIDNEY I. LEZAK
*United States Attorney
District of Oregon*

FILED

NOV 14 1967

MALLORY C. WALKER
Assistant United States Attorney

WM. B. LUCK, CLERK

NOV 13 1967

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United States
Court of Appeals
for the Ninth Circuit

JAMES CARLTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLEE

JURISDICTION

The Government concurs with the JURISDICTIONAL STATEMENT set forth in APPELLANT'S OPENING BRIEF.

COUNTER STATEMENT OF THE CASE

A. THE EVIDENCE.

On the date of the admitted attack, Susan David was 19 years old and married to a Coast Guardsman. She did not know defendant James Carlton (Tr. 21, 23). Defendant stealthily entered the switchboard

room, came silently behind Mrs. David and said: "DON'T SAY ANYTHING" (Tr. 24). Then the defendant hammerlocked Mrs. David around the throat and began choking her. Mrs. David fought to get away; she struggled to rip defendant's arm from against her throat; she reached up to tear at defendant's ear; she grappled to fight him off (Tr. 24, 25). Defendant dragged Mrs. David to an adjoining passageway; he choked her until she couldn't breathe; her tongue began to swell; her body went limp; she was fearful of being raped and killed. Defendant threw Mrs. David to the floor and forced her panties down below her knees (Tr. 25, 27).

After the switchboard rang, defendant loomed behind Mrs. David and barred the only escape route (Tr. 27). No one else was in or near the building where the attack occurred (Tr. 30). Mrs. David submitted to penetration by the defendant in fear of her life (Tr. 32).

B. THE CHARGE.

The issues raised by appellant relate to the trial judge's charge to the jury. In addition to other instructions on the law, the jury was told not to single out one instruction alone as stating the law, but to consider the instructions as a whole (Tr. 68).

The instruction on general intent was given (Tr. 69); and the jury was advised of the power of the

judge to comment on the evidence. The jury was cautioned to disregard any opinion on the facts it might believe the judge held because the jury was the sole and exclusive judges of the facts (Tr. 73, 74).

The trial judge instructed on the essential elements of rape, defined "carnal knowledge" and commented that the fact of penetration had been stipulated to. The distinction between "consent" and "submission" was explained and instructions were given on "force" and "fear".

Then the trial judge gave the instruction on the lesser included offense of assault with intent to commit rape (Tr. 76, 77). The judge defined the elements of the lesser included offense and gave the instruction on specific intent (Tr. 77).

At the close of the charge, defendant excepted to the judge's failure to give defendant's requested instruction on the element of intent to put the prosecutrix in fear of death or grave bodily harm (Tr. 79, 80; R. 4).

The jury retired and thereafter returned with a question on penetration. The trial judge first advised that his supplemental instruction should be considered together with all the other instructions he had given. The judge explained that "penetration" was an established fact. He then gave supplemental instruc-

tions on the elements of rape and on consent, submission, fear, bodily harm and general intent. The court instructed further on the lesser included offense (Tr. 82, 83, 84).

Defendant objected to the supplemental instructions and the trial judge considered and corrected those instructions (Tr. 85, 86).

Thereafter, the court commented on the evidence established by the testimony. Defendant immediately objected to the trial judge's comment, and again objected to the failure of the judge to charge that the defendant must have had a specific intention to put the prosecutrix in fear of death (Tr. 86, 87).

After retiring, the jury returned to the courtroom again. The trial judge inquired as to the number of jurors who believed that after dinner they could or could not arrive at a verdict (Tr. 88, 89).

A colloquy occurred between the court and the jury and, in answer to questioning, the trial judge gave additional instructions on the elements of rape and on the elements of the lesser charge of assault with intent to rape. Defendant moved for a mistrial and objected to the court's supplemental instructions.

Except as further clarified herein, the Government agrees with the balance of the appellant's STATEMENT OF THE CASE.

ANSWER TO SPECIFICATIONS NOS. 1 AND 2

THE TRIAL COURT CORRECTLY REFUSED TO GIVE DEFENDANT'S REQUESTED INSTRUCTION WITH RESPECT TO INTENT, AND ITS SUPPLEMENTAL INSTRUCTIONS WERE NOT ERRONEOUS NOR PREJUDICIAL.

ARGUMENT

Appellant's scattergun attack on the charge of the trial judge commingles objections relating to the charge of rape with those pertaining to the lesser included offense. Appellant was found not guilty on the charge of rape, therefore all objections relating to "rape" are mooted.

A. DEFENDANT'S REQUESTED INSTRUCTION

1. The requested instruction obviously relates to specific intent and was clearly erroneous:

"If you find that the defendant lacked the (specific) intent to put the prosecutrix in fear of death or grave bodily harm, you must find the defendant not guilty." (R. 4)

Not guilty of what?—Rape or assault with intent to commit rape? The requested instruction does not give a clear reference, however, APPELLANT'S OPENING BRIEF hints that the requested instruction refers only to the crime of rape (Ap. Br. pp. 6, 7).

Rape is not a crime which requires a specific intent.

State v. Smith (1940), 3 Wash. 2d 543, 101 P.2d 298, involved a rape prosecution. On appeal defendant contended that the trial court had erred in refusing to give a requested instruction on specific intent. The trial court, instead, gave the following instruction:

“While a general criminal intent is involved in the crime of rape, no intent is requisite other than that evidenced by the doing of the acts constituting the offense.”

At page 302 of its opinion, the Supreme Court of Washington found no error in the action of the trial court and said:

“We think whatever criminal intent is necessary to be shown in the crime of rape is shown by the doing of the acts constituting the offense.”

In *McGuinn v. United States*, (C.A. D.C., 1950) 191 F.2d 477, 479, the defendant appealed his conviction of rape and sodomy. On appeal it was alleged that the trial court erred in failing to give a requested instruction that rape requires that a specific intent be found to exist. The Court of Appeals denied that contention by simply stating:

“Rape is not a crime which requires a specific intent.”

The idea of specific intent signifies the absence of accident, inadvertence or casualty. It is the contrary

of an innocent state of mind. In *Wigmore's Third Edition*, Vol. II, Sec. 356, at Page 266, it is stated:

"Where the charge is rape, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but, practically, if the act is proved there can be no real question as to intent."

2. If we assume defendant's requested instruction was intended to relate to the lesser included offense, that instruction did not state the law. The essential elements of assault with intent to commit rape are (1) an assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female. *Baber v. United States*, (C.A. D.C., 1963) 324 F.2d 390, 392. The lesser included offense does not require a showing of specific intent, on the part of the defendant, to put the woman in fear of death or grave bodily harm.

The question of fear on the part of the woman relates to whether or not there was consent to a penetration, and is applicable only to the higher offense of rape; and rape does not require any specific intent. The requested instruction was not only an erroneous statement of the law but also illogical. The woman's fear is contingent upon the conduct of the man. If the man's conduct is not such as to place the woman

in reasonable apprehension of harm, his intent to put her in fear is totally irrelevant.

Neither *Baber v. United States*, *supra*, nor *People v. Jenkins*, (1930) 342 I11. 238, 174 N.E. 30, stand for the proposition suggested by defendant's requested instruction. Both of those cases involved assaults with intent to commit rape. In both cases the facts showed disgraceful conduct and an indecent assault, but the evidence failed to show intent to have sexual intercourse by force and against the resistance of the woman. The issue of fear did not arise in these cases.

The trial judge was under no obligation to give a requested instruction which was clearly erroneous. *Lash v. United States*, (C.A. 1, 1955) 221 F.2d 241.

B. GRAVE BODILY HARM—REAL AND UNFANCIFUL FEAR

The trial judge prefaced his supplemental instructions with the following charge (Tr. 82):

“Whatever I say should be considered together with all the other instructions that I have given you.”

Defendant objected to the judge's alleged failure to use the phrases “grave bodily harm” and “fear must be real and not fanciful”. Words of identical import were included in the trial court's instructions:

“*** By constructive force I mean where a woman yields through fear caused by threats of grave bodily harm, rather than because of actual physical force.

* * *

“The fear, to be sufficient for this purpose, must be based upon something of substance; and furthermore, the fear must be of death or severe bodily harm.

“She must have a reasonable apprehension of something real; her fear must be not fanciful but substantial.” (Tr. 75, 76)

and,

“My attention has been called to the fact that when I gave you those instructions, I failed to tell you that she must have had a reasonable apprehension of some grave bodily danger or death, and that the fear must have not been fanciful but substantial.” (Tr. 85)

Whether a jury is properly instructed cannot be determined from a consideration of a single paragraph, sentence or phrase, but the instructions must be considered as a whole. *Beck v. United States*, (C.A. 9, 1962) 298 F.2d 622, 634.

C. GENERAL INTENT

Appellant objected to the alleged failure of the trial judge to instruct on the general requisite of criminal intent (Tr. 85). The judge had previously done so:

"To constitute a crime there must be the joint operation of two essential elements, an act forbidden by law and an intent to do the act.

"Before a Defendant may be found guilty of a crime the prosecution must establish beyond doubt that under the statute defined in these instructions, the accused was forbidden to do the act charged in the indictment, and that he intentionally committed the act.

"In this connection, you may infer that every person intends the natural consequences of his voluntary acts." (TR. 69)

The judge went further than requested after considering defendant's objection:

"In connection with this matter of intent, an act must be done with specific intent to do something which the law forbids. That is to say, with bad purpose either to disobey or disregard the law." (TR. 85, 86)

D. SPECIFIC INTENT

For the very first time appellant claims, on appeal, that:

"The instruction with respect to assault with intent to commit rape (Tr. 84) omitted entirely any reference to intent, which is a specific requirement of that crime. 18 U.S.C. 113(a)." (Ap. Br., p. 11)

The trial judge properly charged the jury as to specific intent with reference to the lesser included crime:

"Any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to so do, and an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching or striking or doing bodily harm, to the person of another.

"The word to 'attempt' an offense means willfully to do some act, in an effort to bring about or accomplish something the law forbids to be done.

"An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." (Tr. 77)

Also, see the above quoted corrective instruction (Tr. 85, 86), and the judge's last instruction to the jury (Tr. 90):

"If on the other hand, the Defendant put his arms around her throat, and told her not to say anything with the intent thereof to committing rape, then he let her go and subsequently she acquiesced when there was no reasonable grounds on her part to believe that she was in danger of being killed or of grave bodily harm, even though she may have believed that, then he would not be guilty of rape, but he would be guilty of the lesser charge of assault with intent to rape." (Emphasis supplied.)

The failure to interpose timely and specific objections to possible error or omission in the instructions

results in waiver of the objection on appeal. *Rule 30, F.R.C.P.*

E. OTHER LESSER INCLUDED OFFENSES

Also for the first time on appeal, appellant alleges that he was entitled to have the jury instructed on some degree of assault lesser than assault with intent to commit rape.

In *Younger v. United States*, (C.A.D.C., 1959) 263 F.2d 735, the appellant complained that the trial court failed to give an instruction to the effect that the jury could find him guilty of the lesser included offense of simple assault. At page 737 of the opinion the court stated:

“*** The short answer to this is that request for such an instruction was not made.
*** appellant cannot be heard to complain that such an instruction was not given.”

Also, see *State v. Jones*, (1958) 249 N.C. 134, 105 S.E.2d 513, 516.

ANSWER TO SPECIFICATION NO. 3 THE COMMENT OF THE TRIAL JUDGE WAS NOT PREJUDICIAL.

ARGUMENT

The jury was properly instructed on the trial judge's power to comment on the evidence and the credibility of witnesses (Tr. 73). The jury was directed to dis-

regard any attitude or opinion that they might think the trial judge held (Tr. 73).

The statements objected to were prefaced by judicial acknowledgment that such statements were "a matter of comment" (Tr. 86). The evidence commented upon was not in dispute; the trial judge did not add to the evidence; he was not argumentative in his comments; he did not urge his own view of the guilt or innocence of the accused; nor did he assume the role of an advocate.

The trial judge made the comment in question as a supplemental instruction to the jury's inquiry as to whether or not there had been penetration at the time the switchboard rang. The trial judge instructed on this point favorably to appellant and obtained a concession from the Government (Tr. 84).

Appellant's objections, in addition to intent, related to the degree of fear that prosecutrix must have suffered in order to show submission rather than consent (Tr. 85). It is evident that the trial judge's comment on the fact of prosecutrix's bowell movement during penetration was pertinently related to the question of fear, penetration and consent (Tr. 41, 42).

Appellant quotes *Billeci v. United States*, (C.A.D.C., 1950) 184 F.2d 394, for the general rule governing federal trial court judges in commenting upon the evi-

dence. The gravamen of the trial court's conduct in *Billeci* was that the judge erroneously gave the "willful and flagrant" *Horning* charge (254 U.S. 135) in a case where the facts were disputed. Language of the court in the *Billeci* case, which appellant omits, supports the trial judge's comment in the instant appeal (Ap. Br. pp. 13, 14). At pages 402-403 of its opinion, the District of Columbia Court of Appeals also stated:

"A federal trial judge in a criminal case *** may guide and assist the jury in its consideration of the evidence. The purpose of his comment is to aid through his experience, the inexperienced laymen in the box in finding the truth in the confusing conflicts of contradictory evidence. In exceptional cases he may even express his opinion upon the evidence, or phases of it. ***"

As in *Billeci*, *supra*, *Blunt v. United States* (C.A. D.C. 1957), 244 F.2d 355, turned on facts totally alien to the facts in the instant case. In a prosecution for robbery, the trial judge added to the evidence and based his instructions upon his own addition; he made improper comments regarding the release of a dangerous man to prey upon society; and through an erroneous instruction, he took from the jury an issue which should have been considered.

Appellant also quotes from *Quercia v. United States* (1933), 298 U.S. 466. The trial judge in *Quercia* added to the evidence a concrete assertion of fact based

entirely upon his own experience, and then he based his instruction upon his own addition. Again the appellant omits a pertinent paragraph of the court's pronouncement:

"In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination."

In the instant case the trial judge's instructions were clear, definite and understandable, and his comments coincided with the facts developed by the testimony.

ANSWER TO SPECIFICATION NO. 4

THE TRIAL JUDGE DID NOT INQUIRE OF THE JURY AS TO THE NATURE OR EXTENT OF ITS NUMERICAL DIVISION OR THE PROPORTION OF DIVISION OF OPINION.

ARGUMENT

The trial judge asked how many jurors believed that with additional time a verdict could or could not be reached (Tr. 89). The numerical standing of the jury could not have been disclosed by any response to this inquiry. Of the jurors who believed additional time would produce a verdict, any one or more of them could have been standing either for or against convic-

tion. The same logic applies to the two jurors who at that moment believed that no amount of time would produce a verdict. The critical existence of a minority was not revealed and the possibility of coercion was non-existent.

The trial judge's inquiry was not accompanied by an admonishment on the duty of the jury to reach agreement. The information elicited was useful to the judge in deciding whether arrangements should be made for dinner for the jurors (Tr. 88).

For the reasons given above, *Cook v. United States* (C.A. 5, 1958), 254 F.2d 871, has no application in the instant appeal. In addition, the trial judge in *Cook* actually inquired as to the numerical standing of the jury and threatened to hold the jury together through Thursday, Friday, Saturday and Sunday, thus exerting an improper influence or coercion upon the minority determined by his inquiry.

Brasfield v. United States (1926), 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345, involved a trial judge who inquired how the jury was numerically divided. The foreman answered that the jury stood nine to three. *Brasfield* is not precedent for the instant appeal because here there is no evidence of a threat to a dissenting minority, nor coercion, nor undue influence. The trial judge's inquiry in no way affected substantial rights of the defendant.

ANSWER TO SPECIFICATION NO. 5

THE TRIAL JUDGE'S STATEMENT REGARDING SPECIFIC INTENT TO COMMIT RAPE, IN THE CONTEXT GIVEN, WAS NEITHER ERRONEOUS NOR PREJUDICIAL.

ARGUMENT

The colloquy between juror Ragnone and the trial judge clearly reveals that the question troubling Ragnone was whether defendant had to have a specific intent to commit rape (Tr. 89, 90). On that precise point, the trial judge's instruction followed precedent.

In *Askew v. State* (1960), 118 So.2d 219, a prosecution for rape, appellant claimed because of intoxication he was unable to form the requisite specific intent to commit rape. At page 22 of its opinion, the court stated:

"We do not agree that such a specific intent is the essence of the crime of rape.

"Although very little has been written in this state on the subject of intent in rape prosecutions, it is clear that while a general intent is requisite other than is evidenced by the doing of the acts constituting the offense.

"The law makes the act of rape the crime and infers a criminal intent from the act itself." (Also, see *State v. Hairston* (1943), 222 N.C. 455, 23 S.E.2d 885; *McQuinn v. U.S.*, *supra*.)

The answer given juror Ragnone applied only to the charge of rape (Tr. 90). The trial judge thereafter

* Omitted language: "is involved in the crime, no specific intent"

distinguished the two different subjects and gave an explanatory charge on assault with intent to commit rape (Tr. 90):

“If on the other hand, the Defendant put his arms around her throat, and told her not to say anything with the intent thereof to committing rape, then he let her go and subsequently she acquiesced when there was no reasonable grounds on her part to believe that she was in danger of being killed or of grave bodily harm, even though she may have believed this, but if there was no reasonable grounds to believe that, then he would not be guilty of rape, but he would be guilty of the lesser charge of assault with intent to rape.” (Emphasis supplied.)

These statements, omitted from Appellant’s Opening Brief, were the court’s last words and served to assist the jury toward an intelligent understanding of the legal and factual issues involved.

The court’s duty under these circumstances is stated in *Bollenbach v. United States* (1946), 326 U.S. 607 612:

*“The jury’s questions *** clearly indicated that the jurors were confused *** Discharge of the jury’s responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge’s responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. ***”*

Juror Ragnone made explicit his difficulties and the trial judge properly cleared them away with concrete accuracy.

CONCLUSION

The facts in this case are not in dispute; and the evidence of defendant's guilt was overwhelming. Examination of the record clearly reveals that no error was committed by the trial judge, and neither was defendant deprived of any substantial right guaranteed by the Constitution. Therefore, it is respectfully requested that defendant's conviction be sustained.

Respectfully submitted,

SIDNEY I. LEZAK
United States Attorney
District of Oregon

MALLORY C. WALKER
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 13th day of November, 1967.

MALLORY C. WALKER
Assistant United States Attorney

**United States
Court of Appeals**
for the Ninth Circuit

FRED H. STEGEMAN and
IONE E. STEGEMAN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

*On Appeal from the United States District Court
for the District of Oregon*

HONORABLE Robert C. Belloni, Judge

BRIEF OF APPELLEE

FILED

SIDNEY I. LEZAK
*United States Attorney,
District of Oregon.*

JAN 8 1968

JACK G. COLLINS
*First Assistant United States Attorney
506 U. S. Courthouse, Box 71
Portland, Oregon 97207
Attorneys for Appellee*

WM. B. LUCK, CLERK

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United States
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FRED H. STEGEMAN and
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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

*On Appeal from the United States District Court
for the District of Oregon*

HONORABLE Robert C. Belloni, *Judge*

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon was based on 18 U.S.C. 3231. This Court has jurisdiction by virtue of 28 U.S.C. 1291. The indictment charges offenses against the laws of the United States.

STATUTES INVOLVED

18 U.S.C. 152. Concealment of assets; false oaths and claims; bribery

“Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

“Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

“Shall be fined not more than \$5,000 or imprisoned not more than five years, or both”

COUNTER-STATEMENT OF THE CASE

On February 19, 1964, an Indictment in two counts charging violations of 18 USC §152 was filed against defendants Fred and Ione Stegeman in the United States District Court for the District of Oregon. Count I of the Indictment charged defendants with knowingly and fraudulently transferring, concealing and removing from the District of Oregon, in contemplation of bankruptcy proceedings against them, various items of their property. Defendants were charged in Count II of the Indictment with knowingly and fraudulently concealing from creditors and the Trustee of their bankrupt estates certain items of their property in violation of 18 USC §152.

On the date this Indictment was returned, February 19, 1964, defendants were residing at Nelson, British Columbia, Canada. At the instance of the United States, they were extradited from the Dominion of Canada and returned to Portland, Oregon, on December 22, 1966. Defendants were tried before a jury for four days (April 24 - 27, 1967). Defendants elected to rest their respective cases following presentation of the Government's case. They were each found guilty on both counts of the Indictment. On May 24, 1967, the District Court (Honorable Robert C. Belloni) sentenced each defendant on Count I of the Indictment to a term of imprisonment of one year and a fine of \$5,000.00 and suspended imposition of sentence upon

Count II of the Indictment and placed defendants on probation for a period of four years, such probation to follow release from the imprisonment imposed on Count I and upon the special condition that defendants cooperate fully with their Trustee in bankruptcy in an effort to locate all the assets of their bankrupt estates, including cash (R. 154) (See Appendix, page 100).

For several years prior to 1960, defendant Fred H. Stegeman, doing business as Fred H. Stegeman and Associates, was engaged in the construction business. During 1958 and 1960 he entered into agreements with the Bureau of Public Roads to construct portions of a highway near Mt. Hood, Oregon, and Whittier Creek, near Mapleton, Oregon. Stegeman underbid one or both of these jobs and incurred equipment failures. By the Spring of 1960, his deteriorating financial position had become apparent. Stegeman had lost his business once before (Tr. 284).

During the Spring, Summer and Fall of 1960, defendants undertook various actions designed to retain for themselves the contract proceeds due from the Bureau of Public Roads and to conceal such proceeds from their creditors. Among these actions were defendants' transfer of real and personal property (including their Buick car, house trailer, Cessna aircraft, equipment and shop) to their long-time employee Wil-

liam Gaubert and his wife; assignment by Fred Stegeman of the proceeds of his two road contracts to William Gaubert; defendants' transfer of their home and its furnishings in Lebanon, Oregon, and other property to their eldest daughter, Lynn Langmack; defendants' changing joint savings accounts with their daughters to accounts in their daughters' name alone (Tr. 197, 198); defendants' establishment of a bank account in the name of Corda Gaubert at the Lane County Bank, Florence, Oregon, and the use of such account to conduct their failing business; defendants' receipt of \$36,500.00 in United States currency in late November and early December, 1960, followed by their sudden departure for Nelson, British Columbia, Canada, without their three minor children.

During the fall of 1960, defendants consulted John Boock, an attorney at Albany, Oregon. Prior to trial, defendants waived any claim of privilege by virtue of any lawyer-client relationship to any statements, oral or written, made by themselves to John Boock (R. 9). On the 25th or 27th of November, 1960, defendants had an evening meeting at the home of attorney John Boock (Tr. 278). Their desperate financial difficulties were discussed. Various alternatives, including voluntary and involuntary bankruptcy, were considered. It was at this meeting that the comment was made, "You could leave the country" (Tr. 283, 284). Defendants did leave the country during

December, 1960, and thereafter resided at Nelson, British Columbia, Canada.

Defendants' involuntary bankruptcy proceedings were commenced on December 15, 1960. Defendants learned of these proceedings during January, 1961. They were adjudicated bankrupts on January 18, 1961, and a Trustee appointed on February 17, 1961. Defendants' attorney Morley discussed their bankruptcy with the Trustee's attorney prior to his departure and meeting with defendants in Canada. While in Canada in late March of 1961, attorney Morley discussed with defendants their bankruptcy and other matters. Attorney Merle Long did the same during April or May, 1961. The Trustee's attorney, Walter Pendergrass, made personal demands upon defendants in Canada for the location of their Cessna aircraft and the sum of \$36,500.00 in United States currency about April 30, 1962.

Defendants left the United States in late 1960 with, among other things, their 1959 Buick automobile and Glider trailer-house. Defendants' Cessna aircraft was flown from Springfield, Oregon, to Pasco, Washington, and Nelson, British Columbia, Canada, in February and March, 1961. This aircraft was not discovered by the Trustee in Bankruptcy until December, 1962, at Colville, Washington.

On October 27, 1960, defendants purchased two \$15,000 cashier's checks in favor of their daughters, Pamela and Marna, with funds received from the Bureau of Public Roads. The \$15,000 cashier's check payable to Marna Stegeman was later reduced to another cashier's check in favor of Marna Stegeman on November 10, 1960, in the sum of \$11,598.68.¹ During January, 1961, defendants returned these checks from Nelson, British Columbia, Canada, to their eldest daughter, Lynn Langmack, at Albany, Oregon, with directions to deliver them to attorney John Boock. Attorney Boock, after consultation with defendants, deposited these checks in the Albany, Oregon, bank account of an Oregon corporation entitled FIMPS Investment Company (Fred, Ione, Marna and Pamela Stegeman), which attorney Boock had incorporated for this purpose.

Defendants' attorney Boock did not reveal to the Trustee the existence of the sum of \$26,598.68, being the proceeds of the two previously-mentioned cashier's checks until after April 1, 1961.

Prior to defendants' departure to Canada, Fred Stegeman left money with his eldest daughter to pay some of his debts. Corda Gaubert, acting for defend-

¹ Defendants' receipt and disposition of certain funds received from the Bureau of Public Roads is set forth in a chart (Govt. Ex. 4) reproduced in the Appendix of this Brief, pp. 67a.

ants, transferred the balance of defendants' funds in the Lane County Bank at Florence, Oregon, \$4,435, to Lynn Langmack, defendants' eldest daughter, at Albany, Oregon, on December 10, 1960. Lynn Langmack deposited this amount in the special account in her name at the Citizens Bank of Albany, Albany, Oregon, on December 17, 1960. The Trustee did not discover such sum until disclosure of its existence by Albany, Oregon, attorney Merle Long, during the latter part of March, 1961.

Defendants' Oregon attorney, John Boock, received and deposited at Albany, Oregon, on December 12, 1960, a payment to him from Corda Gaubert of approximately \$1,000. The Trustee did not discover the existence of this payment until attorney Boock revealed it to the Trustee during the latter part of March, 1961, or in his letter of April 12, 1961 (See Exs. 1-C and 1-N, reproduced at pp. 69 of the Appendix of this Brief.).

On December 13, 1962, Special Agent Price of the Federal Bureau of Investigation was able to locate Ione Stegeman at her mobile trailer home at Kline's Trailer Court, Nelson, British Columbia, Canada. Agent Price, in the company of Corporal Peever of the RCMP, went to her trailer home. They were admitted, and Agent Price then interviewed defendant

Ione Stegeman in the living room of her trailer home. A daughter and baby were present. This interview took place during daylight hours. Corporal Peever remained silent throughout.

Agent Price was in Canada investigating the nature and whereabouts of defendants' property (their Cessna aircraft and \$36,500.00 in United States currency had not been discovered by the Trustee). Agent Price was also attempting to learn the circumstances of their departure from the United States and residence in Canada. Although no decision to undertake prosecution had been made, Agent Price advised Mrs. Stegeman that it was being considered. He relayed the opinion of the United States Attorney for Oregon that in the event of such prosecution, she and her husband could be extradited from Canada. Agent Price warned Mrs. Stegeman that she need make no statement to him, that any such statement could be used in a Court of law, and she could consult an attorney. He further advised Mrs. Stegeman that any statement she might make must be completely voluntary on her part and that she might stop the interview at any time. She indicated to Agent Price that she had previously furnished all the information she knew about the matter to an attorney and other men from Oregon. She added, however, that Agent Price might go ahead and ask his questions. The interview was later terminated following Mrs. Stegeman's request.

On February 20, 1963, Agent Price was able to locate Fred H. Stegeman at his place of employment at a plant of Celgar, Limited, near Castlegar, B.C., Canada. Agent Price went to this plant, in the company of an RCMP officer. This officer contacted Stegeman while at work. Stegeman was requested to come to the office of the RCMP at Castlegar for an interview with Agent Price. Agent Price and the RCMP officer then departed. At the conclusion of his work shift, approximately one half hour later, Stegeman came in his own Jeep to the office of the RCMP at Castlegar. Agent Price and Mr. Stegeman were allotted a room at the office.

Agent Price warned Fred Stegeman that he need not make any statements, that any information he did furnish could be used against him in a Court of law, and that he had the right to consult an attorney. Agent Price explained the purpose of his interview was to give Stegeman the opportunity to make a full and complete disclosure of all assets and liabilities regarding his bankruptcy (At this time the Trustee had not located the sum of \$36,500.00 in United States currency received by the Stegemans shortly before their departure for Canada — the Trustee never located this sum.). Fred Stegeman was further told that this interview must be completely voluntary on his part and that it might be terminated whenever he desired. Stegeman was at liberty to leave at any time and was

so told. The interview lasted about an hour and a half to two hours. No other persons participated in this interview, although other RCMP officers were occasionally about the room on other business.

At the time of these interviews, Fred and Ione Stegeman were not under arrest, subpoena, extradition proceedings or in any way deprived of their freedom. Defendants had obtained the advice of attorneys John Boock, Laurence Morley and Merle Long well prior to their interviews with Agent Price.

At the time of trial, defendants asserted an attorney-client privilege as to any communications by or to them on the part of Lebanon attorney Laurence Morley and Albany attorney Merle Long. The Court sustained defendants' claim as to attorney Long (Tr. 305). The Government limited the evidence which it sought from attorney Morley to a copy of a letter written by attorney Morley to defendants in Canada (Ex. 2-0). This copy had been sent by attorney Morley to the Trustee's attorney, Walter Pendergrass. Following a hearing out of the presence of the jury, the District Court overruled defendants' objections on the grounds of attorney-client privilege as to this copy of attorney Morley's letter. In doing so, the Court stated in part that

"Mr. Morley in representing his clients, the defendants, had authority to act on their be-

half. He felt that it was to their advantage that Mr. Pendergrass, a third person, receive a copy of the communication. That destroyed the confidential nature of the communication. A mere payment of transportation expenses by the Trustee did not make him co-counsel with Pendergrass. Pendergrass' clients' interest was adverse to that of the defendants. Secondly, there is strong evidence in this case that on that date, April 7, 1961, the defendants were still concealing assets in violation of the law. An attorney's advice about a course of continuing violation of the law is not privileged. This is a close question. Defendants made a very good argument, and they have a record on it. Nothing more need be said."

SUMMARY OF ARGUMENT

I

The District Court was correct in admitting defendants' statements to Special Agent Price. Following hearing as required by *Jackson v. Denno*, 378 US 368 (1963), the District Court found "... that without any doubt there was deprivation of freedom of any action for either defendant in this case at the time of the interrogation. In other words, there was no custody situation, and a Motion to exclude the admission is denied..." There is substantial evidence to support this finding.

Defendant Ione Stegeman talked with Special Agent Price of the Federal Bureau of Investigation at her mobile trailer home at Kline's Trailer Court, Nelson, British Columbia, Canada, on December 13, 1962. Following work on February 20, 1963, defendant Fred Stegeman came to the office of the Royal Canadian Mounted Police at Castlegar, British Columbia, Canada, and also talked with Agent Price. Defendants object to the use of their statements made to Agent Price on the ground that they did not receive the full four-fold warning required by *Miranda v. Arizona*, 384 US 436, 479 (1966). Agent Price did warn each defendant in the standard manner then given by Special Agents of the FBI to both suspects and persons under arrest, which was held "... consistent with the pro-

cedure . . ." delineated in *Miranda v. Arizona*, 384 US 436, 484 (1966). The District Court found that defendants at the time of making their respective statements were not in custody or otherwise deprived of their freedom of action in any significant way. See *Miranda v. Arizona*, 384 US 436, 444, 477 (1966) (Tr. 152-156). Accordingly, the warnings required by *Miranda* were not required.

At the time of making their respective statements, neither defendant was under indictment, arrest, subpoena, or subject to extradition proceedings. At no time did either defendant ask to consult with counsel or to have counsel present. At no time were any tricks, cajolery, threats or violence employed nor do defendants suggest they were.

Ione Stegeman talked with Agent Price in the familiar surroundings of the living room of her trailer house during daylight hours. Agent Price advised her that she need not talk with him, that the information which she might furnish could be used against her in Court, that she had a right to consult an attorney, and that any statements which she did make would have to be voluntary on her part. She was advised she could stop at any time she desired, and on one occasion she responded "Well no, go ahead and ask your questions." This interview took place in the presence of Corporal Charles Peever, RCMP, who remained silent through-

out. A young girl, whom Agent Price took to be Mrs. Stegeman's daughter was also present, as was a young baby. After a time, Mrs. Stegeman indicated she did not care to furnish further information, and Agent Price and Corporal Peever departed. Mrs. Stegeman was not arrested or taken into custody, nor was it anyone's intention to do so.

Agent Price's purpose in going to Canada was to attempt to locate Mr. and Mrs. Stegeman, to give her an opportunity to make a full and complete disclosure regarding alleged concealment of assets and to advise her there was a possibility of a violation of the National Bankruptcy Act. No decision to undertake prosecution against Mrs. Stegeman had yet been made. Agent Price was attempting to determine the facts respecting the nature and location of defendants' property, portions of which the Trustee in bankruptcy had not yet located (Defendants' Cessna aircraft and the sum of \$36,500.00 in United States currency). Agent Price was engaged in an investigation to determine the facts from which a determination might be made as to whether a violation of the laws of the United States had occurred.

This is not in-custody interrogation as encompassed by *Miranda v. Arizona*, 384 US 436 (1966). The evidence is clear and uncontradicted that this was not an incommunicado interrogation in a police-dominated

atmosphere. Mrs. Stegeman was not in custody, nor was she deprived of her freedom of action in any significant way.

On February 20, 1963, Agent Price located Fred Stegeman working at the Celgar plant near Castlegar, British Columbia, Canada. Agent Price at this time continued to be engaged in an investigation of an alleged concealment of funds in regard to a possible violation of the National Bankruptcy Act (The Trustee in bankruptcy had not yet located the sum of \$36,500.00 in United States Currency). Agent Price, together with an RCMP officer went to the Celgar plant. That officer located Stegeman who agreed to come to the office of the RCMP at Castlegar to talk with Agent Price after work. He did so.

Following his arrival, Fred Stegeman and Agent Price were given a room in which to talk at the police office. No one else was present although Canadian police officers occasionally passed through the room. Agent Price advised Fred Stegeman that he did not have to make any statements, that any information he did furnish could be used against him in a Court of law, and that he had a right to consult an attorney. This warning again conformed to the standard warning long given by Special Agents of the FBI and "... is consistent with the procedure . . ." delineated in *Miranda v. Arizona*, 384 US 436, 484 (1966). Agent

Price advised Fred Stegeman of the purpose of the interview, namely to give him an opportunity to make a full and complete disclosure of all assets and liabilities in regard to his involuntary bankruptcy. Fred Stegeman responded that he was willing to talk to Agent Price and furnish any information. Stegeman was told that he could stop the interview at any time. Fred Stegeman was at liberty to leave at any time and was so told. He was further told that anything he said had to be strictly voluntary on his part. At no time was Fred Stegeman arrested or taken into custody by the Canadian police or anyone else, nor was such action contemplated. No decision to undertake prosecution of Fred Stegeman had then been made.

It is clear that Agent Price's interview of Fred Stegeman was not an incommunicado interrogation in a police-dominated atmosphere. A room at the office of the RCMP at Castlegar, British Columbia, Canada, was made available to them as a matter of courtesy and was used as a more convenient place to discuss these matters than Stegeman's place of employment. Fred Stegeman's statements were volunteered during the course of an investigation to determine whether or not a violation of the National Bankruptcy Act had occurred. The District Court was correct in permitting Agent Price to testify regarding Fred Stegeman's statements to him in Canada on February 20, 1963.

SUMMARY OF ARGUMENT

II

The District Court was correct in rejecting defendants' Requested Instruction No. 15. Defendants suggest they took no direct action in Oregon after learning of their bankruptcy and appointment of a Trustee. There is substantial evidence to the contrary. Defendants further suggest that even after learning of their bankruptcies, the appointment of a Trustee, and his personal demands upon them in Canada, they still had no duty to disclose the nature, location, and value of their property. Defendants argue, as we understand them, that the inability of the Bankruptcy Court to assert personal jurisdiction over them in Canada makes it impossible as a matter of law for them to conceal their property from a Trustee while in Canada. This is not the law.

Once defendants learned of the Trustee's appointment, they had a duty, imposed by Section 7a of the Bankruptcy Act, to disclose their property to him. This duty follows them wherever they may go and wherever their property may be. It does not stop at the Canadian border. Defendants' silence, while in Canada, worked a concealment upon their Trustee in Oregon. Were it otherwise, we should expect all bankrupts to depart with their property for Canada.

SUMMARY OF ARGUMENT

III

The District Court was correct in admitting Government Exhibit 2-0. This exhibit is a copy of a letter, the original of which was sent by attorney Laurence Morley to defendants in Nelson, British Columbia, Canada. Attorney Morley sent this copy to attorney Walter Pendergrass, attorney for the Trustee of the bankrupt estates of the defendants. Defendants objected to the admission of this exhibit upon the ground that it was a confidential communication between attorney (Morley) and clients (Fred and Ione Stegeman). The District Court received testimony and heard argument on this matter out of the presence of the jury. On the morning of the third day of trial, the District Court admitted Exhibit 2-0 in evidence and stated its reasons:

“ . . . Mr. Morley, in representing his clients, the defendants, had authority to act on their behalf. He felt that it was to their advantage that Mr. Pendergrass, a third person, receive a copy of the communication. That destroyed the confidential nature of the communication. The mere payment of transportation expenses by the Trustee did not make him co-counsel with Pendergrass. Pendergrass' clients' interest was adverse to that of the defendants.

"Secondly, there is strong evidence in this case that on that date, April 7, 1961, the defendants were still concealing assets in violation of the law. An attorney's advice about a course of continuing violation of the law is not privileged. This is a close question. The defendants made a very good argument, and they have a record on it. Nothing more need be said." (Tr. 362, 363)

Prior to admitting Exhibit 2-0 in evidence, the District Court had heard a major portion of the Government's case as well as the testimony of attorneys Morley and Long and Special Agent Price. The Court had learned of defendants' actions constituting a plan for their continued transfer and concealment of their property from their creditors and the Trustee of their bankrupt estates. Defendants' concealment of portions of their property was in progress during the time of attorney Morley's Canadian meeting with them in late March, 1961, and at the time he sent his letter of April 7, 1961. Defendants' Cessna aircraft had not then been discovered by the Trustee and was not discovered until December, 1962. Defendants' concealment of \$36,500.00 in United States currency was in progress, not only at the time of attorney Morley's visit and letter, but also at the time Exhibit 2-0 was admitted in evidence by the District Court. Attorney Morley's letter of April 7, 1961, provided defendants' advice about their continuing crime and fraud. Such communications are not privileged.

There is substantial evidence to support the District Court's finding of waiver by defendants of any privilege respecting Exhibit 2-0. Attorney Morley had represented defendants for probably ten or twelve years prior to 1960 - 1961. At the time he visited defendants in Canada and wrote his letter of April 7, 1961, he was actively engaged in the defense of two civil actions and the prosecution of another on behalf of Fred Stegeman. Acting on behalf of defendants and in their best interest, attorney Morley sent an undisclosed copy of his letter of April 7, 1961, to the Trustee's attorney. This action was intentional and not inadvertent. Exhibit 2-0 shows upon its face that it was an attempt by attorney Morley on behalf of defendants to forestall criminal prosecution and reduce their potential liability after their bankruptcy proceedings were over. Such advice was rendered to defendants by attorney Morley with respect to and in the course of his management of litigation and their involuntary bankruptcy proceedings. He had entered important negotiations on their behalf.

These unusual and special circumstances created an implied and apparent authority in attorney Morley to act in defendants' best interest in these matters and to make disclosure to the Trustee of the contents of his letter of April 7, 1961. Attorney Morley did act in defendants' best interest. The District Court was

correct in finding a waiver by defendants of any attorney-client privileges to this communication.

Defendants' waiver in advance of trial of any attorney-client privilege as to attorney John Boock constituted a waiver of the privilege by defendants as to their other attorneys, that is Laurence Morley and Merle Long. Defendants should not be permitted to select from among several attorneys one whose advice they find favorable without waiving the privilege as to their other attorneys. It is enough that defendants may use the privilege as a shield. They should not be permitted to use it as a sword. The District Court was correct in finding that attorney Morley had authority to act on the defendants' behalf and did so in sending Exhibit 2-0 to the Trustee's attorney.

If attorney Morley's disclosure to the Trustee's attorney was an accident of his own making, such disclosure is not protected. The risk of a careless attorney is placed upon the client, as in cases of loss or theft of documents from an attorney's possession. A similar rule is found in communications between husband and wife and in communications overheard by third persons without the client's knowledge.

Assuming, arguendo, that attorney Morley was co-counsel for the Trustee of defendants' bankrupt estates, he has a statutory and ethical duty to disclose to the Trustee his communication to defendants respecting

their continuing crime and fraud. 18 USC §3057 requires a Trustee to report violations of the Bankruptcy Laws to the United States Attorney. As co-counsel for the Trustee, attorney Morley could not sit idly by and allow defendants to continue to defraud their creditors and the Trustee for whom he was counsel. If attorney Morley was the Trustee's co-counsel, then any privilege as to Exhibit 2-0 is that of the Trustee who has made no claim of privilege in this action.

Attorney Morley's communication to defendants of April 7, 1961, was not intended by him to be confidential. Attorney Morley intended to send the Trustee's attorney this copy of his letter of April 7, 1961. A communication made for distribution to persons other than the client is stripped of any attorney-client privilege.

The contents of Exhibit 2-0 were obtained by attorney Morley from third persons and sources other than defendants. Such communications are not privileged.

The District Court was correct in admitting Exhibit 2-0 in evidence.

ARGUMENT

I

**THE DISTRICT COURT WAS CORRECT IN ADMITTING
DEFENDANTS' STATEMENTS TO SPECIAL AGENT
PRICE**

Defendants assign error in the District Court's ruling permitting their statements to Special Agent William D. Price of the Federal Bureau of Investigation to be received in evidence (App. Br., Pg. 10) (Tr. 156, 410-434).²

² Rule 38 of the United States District Court for the District of Oregon provides:

"Unless otherwise ordered, the United States Attorney, at least ten days prior to trial, shall give written notice to the defendant through his attorney of any and all written or oral confessions or admissions of the defendant which the Government intends to use during the course of the trial.

"Not less than five days prior to the trial date, defendant's attorney shall, unless otherwise ordered, notify the Clerk of the Court and the United States Attorney of the objections, if any, which defendant may have to such confessions or admissions. On receipt of the objections, the Clerk shall fix a time and place for hearing such objections and determining the admissibility of the alleged confessions or admissions."

Defendants were supplied copies of their statements as made to Agent Price more than ten days in advance of trial. These statements are printed at pages 76-87 of the Appendix of this Brief. Defendants' first objection to the use of such statements was made on the first day of trial. Thereafter, during the first day of trial, the District Court conducted a hearing as required by *Jackson v. Denno*, 378 US 368 (1963). Following such hearing, the Court found (Tr. 156): "THE COURT: I find that without any doubt there was no deprivation of freedom of any action for either defendant in this case at the time of the interrogation. In other words, there was no custody situation, and a Motion to exclude the admission is denied. . ."

Defendant Ione Stegeman talked with Agent Price at her mobile trailer home at Kline's Trailer Court, Nelson, British Columbia, Canada, on December 13, 1962.³ Following work on February 20, 1963, defendant Fred Stegeman came to the office of the Royal Canadian Mounted Police at Castlegar, British Columbia, Canada, and also talked with Agent Price. On the first day of trial, the District Court held a hearing out of the presence of the jury as required by *Jackson v. Denno*, 378 US 368 (1963), and denied defendants' Motions to exclude their statements (Tr. 156). Thereafter, Agent Price testified before the jury concerning defendants' conversations with him in Canada (Tr. 410-434).

Defendants object to the use of their statements to Agent Price on the ground that they did not receive the full, four-fold warning required by *Miranda v. Arizona*, 384 US 436, 479 (1966). The question before the District Court quickly resolved itself into a determination of whether or not defendants' statements stemmed from a custodial interrogation further defined as "... questioning initiated by law enforce-

³ Agent Price testified before the jury that he first saw defendant Ione Stegeman at her residence on December 13, 1962 (Tr. 410). Agent Price's report indicates the date of this first visit was December 13, 1962. Agent Price testified at the hearing out of the presence of the jury that his first visit was on November 13, 1962 (Tr. 136). Appellee submits the difference of date is not material.

ment officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 US 436, 444, 477 (1966) (Tr. 152-156). The District Court held that defendants were not in custody and that they were not deprived of their freedom of action in any significant way (Tr. 156). Accordingly, the warnings required by *Miranda* were not required. There is substantial evidence to support the District Court's finding.

Defendants were not under indictment, arrest, subpoena, or subject to extradition proceedings when they talked with Agent Price.⁴ At no time did they ask to consult with counsel or to have counsel present.⁵ At no time were any tricks, cajolery, threats or violence employed, nor do defendants suggest that they were. Defendants had obtained the advice of attorneys John Boock, Laurence Morley and Merle Long well prior to their interviews with Agent Price.

⁴ Defendants were indicted by a Federal Grand Jury at Portland, Oregon, on February 19, 1964 (R. 1). Agent Price's powers as a police officer ceased at the Canadian border.

⁵ No attempt was made in the instant case to keep counsel from defendants. The requirements of *Escobedo v. Illinois*, 378 US 478 (1964) are encompassed, in the instant case, within the requirements of *Miranda v. Arizona*, 384 US 436 (1965). See *Miranda v. Arizona*, *supra*, at 444, footnote 4 and at 465, footnote 35.

A. STATEMENT OF IONE STEGEMAN.

Ione Stegeman talked with Agent Price in the living room of her trailerhouse during daylight hours. He advised her that she need not talk with him, that the information which she might furnish could be used against her in Court, that she had a right to consult an attorney, and that any statements which she did make would have to be voluntary on her part (Tr. 136, 138, 410, 412; Ex. 1 - Interview of Ione Stegeman). Ione Stegeman was advised that she could stop at any time she desired (Tr. 412).⁶ On one occasion Agent Price indicated they could stop their discussion, and she responded "Well, no. Go ahead and ask your questions." (Tr. 413, lines 18 and 19). This interview took place in the presence of Corporal Charles Peever, RCMP, who remained silent throughout. A young girl, whom Agent Price took to be Mrs. Stegeman's daughter, was also present, as was a young baby (Tr. 137). No threats or promises or any suggestion thereof were made by Agent Price or Corporal Peever (Tr. 138). After a time, Mrs. Stegeman indicated she did not care to furnish any further information (Tr. 418). Agent Price and Corporal Peever immediately departed. Mrs. Stegeman was not arrested and not taken

⁶ This warning constitutes the standard warning long given by special agents of the FBI to both suspects and persons under arrest and ". . . is consistent with the procedure . . ." delineated in *Miranda v. Arizona*, 384 US 436, 484 (1966).

into custody, nor was it anyone's intention to do so (Tr. 138, 418).

Agent Price's purpose in going to Canada was to attempt to locate Mr. and Mrs. Stegeman (Tr. 136), to give her an opportunity to make a complete and full disclosure of any and all information she wished to furnish in regard to an alleged concealment of assets and to advise her that there was a possibility of a violation of the National Bankruptcy Act (Tr. 137).⁷ No decision to undertake prosecution against Mrs. Stegeman had yet been made. Agent Price advised Mrs. Stegeman, however, that its possibility was being considered (Tr. 137, 411, 412; See Ex. I - Interview of Ione Stegeman). Agent Price was attempting to determine the facts respecting the nature and location of defendants' property and the circumstances surrounding their departure from the United States and residence in Canada.⁸ Mrs. Stegeman was free to refuse or to give whatever answers she chose or to end the conversation whenever she chose. At the time of this interview Agent Price was engaged in an investigation to determine facts from which a determination might

⁷ See *U.S. v. Konigsberg*, 336 F.2d 844 (CA 3, 1964).

⁸ The Trustee in bankruptcy had not yet located defendants' Cessna aircraft and the sum of \$36,500.00 in United States currency which defendants had received shortly before their departure for Canada.

be made as to whether a violation of the laws of the United States had occurred.

This is not in-custody interrogation as encompassed by *Miranda v. Arizona*, 384 US 436 (1966). *Miranda*, and its accompanying decisions, dealt with interrogations at police stations by police officers following arrest of a defendant. It is generally believed, although not held, that the requirements of *Miranda* extend beyond the police station to situations in which "... questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 US 436, 444, 477 (1966). The District Court found that Ione Stegeman had not been taken into custody and had not been deprived of her freedom as contemplated by *Miranda*.

The District Court's finding is supported by numerous decisions. *Kohatsu v. United States*, 351 F.2d 898, 900 (CA 9, 1965), cert. denied 384 US 1021 [Defendant interviewed by Internal Revenue Agents at his office]; *U.S. v. Bottone*, 365 F.2d 389, 395, alternative holding (CA 2, 1966), cert. denied 385 US 974 [Defendant consented to civil interrogation in connection with patent infringement suit]; *U.S. v. Fiore*, 258 F.Supp 435, 440 (WD Pa, 1966) [Defendant interviewed by Internal Revenue Service Agents at his apartment]; *U.S. v. Bachman*, 267 F.

Supp 593, 595 (WD Pa, 1966) [Defendant interviewed at his home by Internal Revenue Service Agents]; *Nason v. Immigration and Naturalization Service*, 370 F.2d 865, 868 (CA 2, 1967) [Defendant questioned by Customs officers at a border crossing]; *State v. Meunier*, 224 A2d 922 (Vt., 1966) [Defendant interviewed by a uniformed officer at his apartment in a funeral home]; *State v. Cook*, 82 Ore Adv. Sh 167, 411 P.2d 78 (Ore, 1966) [Defendant questioned at place of employment by police officers]; *State v. Zucconi*, A.2d (NJ Sup Ct, November 6, 1967, The Criminal Law Reporter, Volume II, Number 10, December 6, 1967, pg. 2175) [Defendant questioned by police officers in his hospital room and his home].

People v. Allen, 272 NYS 2d 249, 256-257, 50 Misc. 2d 897, 905 (Sup Ct, 1966), relied upon by defendants, is distinguished from the instant case by the fact that police officers with the power to arrest went to defendant's apartment with the intention to arrest the defendant. As noted by the Court "... no refusal to answer, no denial, no exculpatory statement of the defendant would have excused a failure to arrest" (*People v. Allen*, supra., 50 Misc. 2d 897, 905). In addition, the police officer gave none of the four-fold warnings required by *Miranda*. Finally, the Court recognized that investigation would not be considered custody. *People v. Allen*, supra, 50 Misc. 2d 897, 905.

See *Miranda v. Arizona*, 384 US 436, 462, 478 (1966).

The evidence is clear and uncontradicted that defendant Ione Stegeman's conversation with Agent Price was not an incommunicado interrogation in a police-dominated atmosphere. See *U.S. v. Florence*, 367 F.2d 595, 597 (CA 3, 1967). Rather, this interview was incident to an investigation of possible violations of the National Bankruptcy Act under familiar conditions in which Mrs. Stegeman was not deprived of her freedom of action in any significant way.

B. STATEMENT OF FRED STEGEMAN.

Agent Price also went to Canada to look for Fred Stegeman (Tr. 422). On February 20, 1963, he found him working at the Celgar Plant, near Castlegar, British Columbia, Canada. Agent Price was engaged in an investigation of alleged concealment of funds in regards to a possible violation of the National Bankruptcy Act (Tr. 144, 424; Ex. 1 - Interview of Fred Stegeman).⁹ Agent Price, together with an RCMP officer, went to the Celgar Plant. That officer located Stegeman (Tr. 141), who agreed to come to the of-

⁹ At this time the Trustee in bankruptcy had not located the sum of \$36,500 in United States currency which defendants received shortly before their departure from the United States for Canada.

office of the RCMP at Castlegar and talk with Agent Price after work. At approximately 5:00 o'clock in the afternoon, Fred Stegeman came to the RCMP office at Castlegar and talked there with Agent Price for approximately an hour and a half to two hours (Tr. 423, 432).

Following his arrival, Fred Stegeman and Agent Price were given a room in which to talk (Tr. 143). No one else was present at the actual interview, although Canadian police officers occasionally passed through the room (Tr. 143, 144). Agent Price advised Stegeman that he did not have to make any statements, that any information he did furnish could be used against him in a Court of law, and that he had a right to consult an attorney (Tr. 144, 424; Ex. 1 - Interview of Fred Stegeman).¹⁰ Stegeman had come to the office of the RCMP in his own jeep (Tr. 143).

Agent Price advised Stegeman of the purpose of this interview, namely that it was to give him an opportunity to make a full and complete disclosure of all assets and liabilities in regards to his involuntary bankruptcy. (Ex. 1 - Interview of Fred Stegeman)¹¹

¹⁰ This warning constitutes the standard warning long given by special agents of the FBI to both suspects and persons under arrest and "... is consistent with the procedure ..." delineated in *Miranda v. Arizona*, 384 US 436, 484 (1966).

¹¹ See *U.S. v. Konigsberg*, 336 F.2d 844 (CA 3, 1964).

Stegeman responded that he was willing to talk to Agent Price and furnish any information that he knew (Tr. 144, 145, 148). He was told that he could stop the interview at any time (Tr. 424). This interview was conducted at the police office merely as a matter of convenience (Tr. 149). Mr. Stegeman was at liberty to leave at any time and was so told (Tr. 151, 430). He was further told that anything he said had to be strictly voluntary on his part (Tr. 424). At no time was Fred Stegeman arrested or taken into custody by the Canadian police or anyone else (Tr. 430), nor was such action contemplated. No decision to undertake prosecution of Fred Stegeman had then been made.

It is clear that Agent Price's interview of Fred Stegeman was not an incommunicado interrogation in a police-dominated atmosphere of which *Miranda* speaks. *Miranda v. Arizona*, 384 US 436, 461 (1966). A room at the office of the RCMP at Castlegar, British Columbia, Canada, was a more convenient place to discuss these matters than Stegeman's place of employment. This police office was not Agent Price's office or an office of any police force of the United States. Agent Price had no powers as a police officer in Canada, and the RCMP took no interest in this matter other than accompanying Agent Price to serve as a means of verifying his identity as an Agent of the FBI. Their granting of use of a room at their police

office in Castlegar was a matter of courtesy. Fred Stegeman was not deprived of his freedom of action in any significant way. His statements were volunteered during the course of an investigation to determine whether or not a violation of the National Bankruptcy Act had occurred.¹² The District Court was correct in permitting Agent Price to testify regarding Fred Stegeman's statements to him in Canada on February 20, 1963.^{13 14}

¹² See *Miranda v. Arizona*, 384 US 436, 462, 478 (1966).

¹³ See *People v. Graves*, 64 Cal.2d 208, 411 P.2d 114, 49 Cal. Rptr. 380 (1966), cert. denied 385 US 883 (October 10, 1966-*Post-Miranda*); See also *People v. Silva*, 236 Cal. App.2d 453, 46 Cal. Rptr. 87 (1965); *People v. Martinez*, 239 ACA 176, 48 Cal. Rptr. 521 (1966).

¹⁴ The evidence of defendants' guilt is uncontradicted and overwhelming. Should this Court find error in the admission of defendants' statements to Agent Price, it is harmless error. The matters contained in these statements are cumulative. Ione Stegeman's statements about ownership and possession of the 1959 Buick, trailerhouse, and Cessna aircraft and Fred Stegeman's statements about his receipt of \$36,500.00, possession and disposition of this Cessna aircraft, and delivery of Cashier's checks to John Boock (See App. Br., ppg 7, 8) is cumulative, of the testimony and accompanying exhibits of Corda Gaubert (Tr. 63, 96), Charles Hamlin (Tr. 391, 400), Delmar McNutt (Tr. 378-381), Lynn Langmack (Tr. 232-249), John Boock (Tr. 271, 293, 321-332), and stipulated testimony and exhibits (Tr. 227-231). Any such error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 US 18, 24 (1967); *Bushaw v. United States*, 353 F.2d 477, 481 (CA 9, 1965).

II

**THE DISTRICT COURT WAS CORRECT IN REJECTING
DEFENDANTS' REQUESTED INSTRUCTION NO. 15**

Defendants assign as error the District Court's rejection of their Requested Instruction No. 15.¹⁵ This instruction and this assignment of error pertain only to defendants' convictions upon the charge set forth in Count II of the Indictment (R. 23) (See App. Br., pages 20-23).

The District Court, in rejecting defendants' Requested Instruction No. 15, stated (Tr. 521-522):

"... But on the last point you [defendant Fred Stegeman's attorney] just made, it does squarely touch upon something omitted by the Court, because I do not agree with your statement of the law. So it is squarely in the record ..."

"THE COURT: All right, sir. I would be interested to know whether you feel a citizen of the United States who lives in Canada would have to file an income tax return? (Pause) You don't have to answer that" ...

¹⁵ Defendants' Requested Instruction No. 15 is set forth in the Appendix of this Brief, page 99.

A. THERE IS SUBSTANTIAL EVIDENCE OF DEFENDANTS' DIRECT ACTION OF CONCEALMENT IN OREGON AFTER LEARNING OF THE EXISTENCE OF THEIR BANKRUPTCY PROCEEDINGS AND OF THE TRUSTEE.

Defendants suggest the jury may have found that defendants took no direct action in Oregon after learning of their bankruptcies and the appointment of a Trustee. (See App. Br., pages 21-23). There is substantial evidence to the contrary. This evidence, when viewed in the light most favorable to the Government, including reasonable inferences therefrom (*Glasser v. U.S.*, 315 US 60, 80 (1941)), may be summarized as follows:

(1) \$4,435.00 (R. 2) — Defendant Fred Stegeman stated that upon his departure for Canada he left money with his eldest daughter to pay some debts (Ex. 1 - Interview of Fred Stegeman). Corda Gaubert, acting for defendants, transferred the balance of defendants' funds in the Lane County Bank at Florence, Oregon, \$4,435.00, to their eldest daughter, Lynn Langmack, at Albany, Oregon, on December 10, 1960 (Tr. 98, 245, 246; Ex. 2-A). Lynn Langmack deposited this sum in a special account in her name at the Citizens Bank of Albany, Albany, Oregon, on December 17, 1960 (Tr. 245, 246). The Trustee did

not discover such sum until disclosure of its existence to him by Albany, Oregon, attorney Merle Long during the latter part of March, 1961 (Tr. 37, 38, 294).

(2) Approximate Sum of \$1,000.00 to John Boock (R. 2) — Defendants' Oregon attorney, John Boock, received and deposited at Albany, Oregon, on December 12, 1960, a payment to him from Corda Gaubert of approximately \$1,000.00 (Tr. 349, Ex. 1-C). The Trustee did not discover the existence of such payment until attorney Boock revealed it to the Trustee during the latter part of March, 1961, or in his letter of April 12, 1961 (Tr. 39; Exs. 1-N, 2-C).

(3) Approximate Sum of \$26,598.68 (R. 3) — Defendants' attorney, John Boock, did not reveal to the Trustee the existence of the sum of \$26,598.68 until after April 1, 1961 (Tr. 19; Ex. 1-V). John Boock had received such sum from defendants' eldest daughter, Lynn Langmack, in January, 1961, and had caused a major portion of this amount to be deposited, following telephone consultation with defendants, in an Albany, Oregon, bank accounts of FIMPS Investment Co. (Tr. 238-239, 289, 290, 321-322; Exs. 1-M, 1-N, 1-V). Attorney Boock did not reveal his continued retention of this sum at bankruptcy hearing on March 8, 1961 (Ex. 1-V).

(4) Cessna Aircraft (R. 3) — Defendants, with the assistance of William and Corda Gaubert, caused

their Cessna aircraft to be flown from Springfield, Oregon, to Pasco, Washington, and thereafter to Nelson, British Columbia, Canada, during February and March, 1961 (Tr. 392-398). The Trustee did not discover the whereabouts of this aircraft until December, 1962, at Colville, Washington (Tr. 36, 37; Ex. 3-W, p. 5).

Defendants' involuntary bankruptcy proceedings were commenced on December 15, 1960 (Exs. 3-A, 3-G). Defendants learned of these proceedings during January, 1961 (App. Br., p. 22; Ex. 1 - Interview of Ione Stegeman). Defendants were adjudicated bankrupts on January 18, 1961 (Exs. 3-B, 3-H). A Trustee was appointed for their bankrupt estates on February 17, 1961 (Ex. 3-S). Defendants' attorney Morley discussed their bankruptcy with the Trustee's attorney prior to his departure and meeting with defendants in Canada (Tr. 315, 316). Attorney Morley discussed defendants' bankruptcy with them in Canada in March, 1961 (Tr. 308),¹⁰ as did attorney Merle Long during April or May, 1961 (Tr. 299). The Trustee's attorney, Walter Pendergrass, made personal demands upon defendants in Canada for the location of their Cessna aircraft and the sum of \$36,500.00 in United

¹⁰ Appellants contend that attorney Morley was co-counsel for the Trustee at the time of this meeting. See Appellant's Brief, pages 31-33.

States currency about April 30, 1962 (Tr. 29, 30, 36; Ex. 3-W, p. 14, Disbursements, p. 2).

Defendants, acting individually and through their agents, committed direct and affirmative acts of concealment in Oregon of items of their property as charged in Count II of the Indictment after they had knowledge of the existence of their bankruptcy proceedings and the appointment of the Trustee.¹⁷ The District Court properly instructed the jury regarding the nature and elements of concealment and the requirement of defendants' ownership of the properties as charged in the Indictment.

B. AFTER LEARNING OF THE COMMENCEMENT OF THEIR BANKRUPTCY PROCEEDINGS AND THE APPOINTMENT OF A TRUSTEE, DEFENDANTS HAD A DUTY TO DISCLOSE THE WHEREABOUTS OF THEIR PROPERTY.

Defendants' involuntary bankruptcy proceedings were commenced on December 15, 1960. Defendants

¹⁷ Defendants do not assign error in either the Court or jury's determination of defendants' ownership of various items of property as charged in Count II of the Indictment. The Court's instructions clearly apprized the jury that defendants could only be convicted of concealment of property belonging to their bankrupt estates (Tr. 498-502, 509, 512-515). The Court in substance gave defendants' requested instruction in this regard (Tr. 498-502, 509, 512-515; R. 71, 81, 82, 89, 100).

had knowledge of these proceedings during January, 1961. They were adjudicated bankrupts on January 18, 1961, and a Trustee appointed on February 17, 1961. Defendants learned of the Trustee's existence not later than attorney Morley's meeting with them in Canada during late March, 1961 (See Tr. 357).

Within five days after their adjudication as bankrupts, defendants had a duty, *inter alia*, to file schedules indicating the location, nature and value of their property (11 USC §25). The Trustee was not required to make demand of defendants for their property. *Douchan v. U.S.*, 136 F.2d 144, 146 (CCA 6, 1943), cert. denied 319 US 773 (1943).

Rachmil v. U.S., 43 F.2d 878 (CCA 9, 1930), cert. denied 283 US 819, *U.S. v. Yasser*, 114 F.2d 558 (CCA 3, 1940), and *Edwards v. U.S.*, 265 F.2d 302 (CA 9, 1959) require knowledge by defendants of the existence of a bankruptcy proceeding or a Trustee before a bankrupt may be found to have concealed his property in such proceeding or from such Trustee. But see *U.S. v. Goldstein*, 132 Fed. 789 (DC WD Va., 1904) holding that there can be a concealment from a Trustee during the period after the commencement of a bankruptcy proceeding and before the appointment of a Trustee. See Comment, 11 Cornell Law Quarterly, 300, 311.

It is sufficient if the concealment was from either a Trustee or creditors of the bankrupt estates. *U.S. v. Yacht*, 135 F.Supp 911 (DC SDNY, 1955).

Concealment of one of the items of property as charged in the Indictment will constitute the offense. *Bisno v. U.S.*, 299 F.2d 711, 714 (CA 9, 1961), cert. denied 370 US 952 (1962); *Edwards v. U.S.*, 265 F.2d 302, 306 (CA 9, 1959).

The evidence concerning defendants' concealment of the items of property set forth in Count II of the Indictment has been previously summarized. This Court is respectfully referred to the Counterstatement of Facts in Appellee's Brief and the Summary of Evidence set forth in Argument II (A) above.

Defendants, as we understand them, contend that their duty to disclose the nature and location of their property to the Trustee stops at the Canadian border. Defendants appear to say that because the Bankruptcy Court has no power to enforce its Orders over their persons in Canada, that defendants, while in Canada, have no duty to disclose their property to the Trustee.¹⁸

¹⁸ The Bankruptcy Court was able to assert its power over defendants in Canada by making application to Judge Eric P. Dawson of the Kootenay County Court, British Columbia, Canada, for an order compelling the attendance of defendants for deposition. Judge Dawson, on April 10, 1962, ordered the bankrupts to be present for examination on April 30, 1962, at 1:00 P.M., at the County Courthouse of Kootenay County, Nelson, British Columbia (Ex. 3-W, pg. 14).

Defendants make this contention despite their personal knowledge of the existence of their bankruptcy proceedings in Oregon, existence of the Trustee, and his demands made personally upon them in Canada. In short, defendants assert that while in Canada, they cannot conceal their property from their creditors or their Trustee. This is not the law.

Defendants' duty to disclose the nature, location, and value of their property follows them wherever they may go. Section 7(a)(8) of the Bankruptcy Act (11 USC §25) and the statute under which defendants were convicted, 18 USC §152, contain no geographic limitation. Had defendants filed petitions and schedules in Oregon and failed to disclose their assets in such schedules, there would be no question as to the applicability of 18 USC §152. *U.S. v. Schireson*, 116 F.2d 881, 884 (CCA 3, 1940).¹⁹ The result should not be different where defendants remain silent after knowledge of their bankruptcy proceedings and demands upon them by the Trustee.²⁰ Defendants' duty to disclose remains whether they file petitions or re-

¹⁹ Defendants have made no objection to the venue of this action.

²⁰ *Rachmil v. U.S.*, supra.; *U.S. v. Yasser*, supra.; and *Edwards v. U.S.*, supra., relied upon by defendants, turned upon a complete absence of knowledge by the defendant of both the existence of the bankruptcy proceeding and the Trustee at the time of the alleged concealment. Such is not here the case.

main silent. Defendants' failure and omission to speak in the face of a duty to speak imposed upon them by the Bankruptcy Act is an affirmative act no different in result than that which would have followed omission of their property from schedules filed in Oregon. It is as if defendants and their property were on the Canadian side of the line and defendants stood in the line of the Trustee's vision in such a way that the Trustee could not see the objects in Canada. In such instance the concealment would take place on the Oregon side of the line.²¹ The Statute, 18 USC §152, is directed toward concealment by whatever means. See *U.S. v. Greenbaum*, 252 Fed. 259, 264 (ED Mich., 1918); rev'd on other grounds 280 Fed. 474 (CCA 6, 1922). The physical situs of defendants' property is immaterial. See *U.S. v. Schireson*, 116 F.2d 881 (CCA 3, 1940); *Conneto v. U.S.*, 251 Fed. 42, 44 (CCA 9, 1918); 2 Collier's on Bankruptcy, 14th Ed., ~~about its location.~~ 1940, § 29.05 pp. 1163.

Defendants' Requested Instruction No. 15 did not state the law.²² The Court's analogy regarding the duty ~~of individuals to file income tax returns~~ ^{is apt.} ~~1940, § 29.05 pg. 1163.~~ ²³ Were the law otherwise, we might expect bankrupts to leave the jurisdiction, se-

²¹ This analogy is taken from *U.S. v. Schireson*, 116 F.2d 881, 884 (CCA 3, 1940).

²² Defendants' Requested Instruction No. 15 constitutes in part a comment upon the evidence which the Court was not required to make.

crete their property in Canada, and remain silent ~~of Individuals to file Income Tax returns is apt.~~²³ This duty, like the duty of a bankrupt to disclose his property to a bankruptcy Trustee, follows an American citizen wherever he may go.

III

THE DISTRICT COURT WAS CORRECT IN ADMITTING GOVERNMENT EXHIBIT 2-0

Government Exhibit 2-0 is a copy of a letter, the original of which was sent by attorney Laurence Morley to defendants in Nelson, British Columbia, Canada. Attorney Morley sent this copy to attorney Walter Pendergrass, attorney for the Trustee of the bankrupt estates of Fred and Ione Stegeman²⁴ (R. 136, Tr. 363-365). Defendants objected to the admission of this exhibit in evidence upon the ground that it was a confidential communication between attorney (Morley) and clients (Fred and Ione Stegeman) and privileged (R. 134, Tr. 310, 362). The District Court received testimony and heard argument on this matter out of the presence of the jury (Tr. 362-365). On the morning of the third day of trial, the District Court admitted Exhibit 2-0 in evidence (Tr. 362, 365). At that time the Court stated (Tr. 362, 363):

²³ See 26 USC §§ 6012, 6013, 6017, 6031, 6072.

²⁴ Government Exhibit 2-0 is reproduced at pages 70-75 of the Appendix of this brief.

"THE COURT: Exhibit 2-0 will be admitted as evidence in this case —

"MR KRAEMER: Exception, Your Honor.

"THE COURT: — for the following reasons: Mr. Morley, in representing his clients, the defendants, had authority to act on their behalf. He felt that it was to their advantage that Mr. Pendergrass, a third person, receive a copy of the communication. That destroyed the confidential nature of the communication. The mere payment of transportation expenses by the Trustee did not make him co-counsel with Pendergrass. Pendergrass' clients' interest was adverse to that of the defendants.

"Secondly, there is strong evidence in this case that on that date, April 7, 1961, the defendants were still concealing assets in violation of the law. An attorney's advice about a course of continuing violation of the law is not privileged. This is a close question. The defendants made a very good argument, and they have a record on it. Nothing more need be said."

A. EXHIBIT 2-0 DEALT WITH DEFENDANTS' CONTINUING CRIME AND FRAUD. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE DISTRICT COURT'S FINDING THAT THERE IS NO PRIVILEGE FOR SUCH A COMMUNICATION.

Prior to admitting Exhibit 2-0 in evidence, the District Court had heard a major portion of the Govern-

ment's case. It had also heard, out of the presence of the jury, the testimony of attorneys Morley and Long (Tr. 306-320, 294-305) and Special Agent Price (Tr. 135-157). From this evidence, the Court had learned of (1) the commencement of defendants' financial troubles during the Spring and Summer of 1960 (Tr. 9-10, 121-123, 161-168, 173, 176); (2) defendants' transfers of real and personal property (including their Buick car, housetrailer, Cessna aircraft, equipment and shop) to their long-time employee, William Gaubert, and his wife, Corda Gaubert, during April and August, 1960 (Tr. 83-85, 95-96, Exs. 1-R, 1-Q, 1-X); (3) defendant Fred Stegeman's assignment, during August, 1960, of the proceeds of his two road contracts to William Gaubert (Tr. 181-184; Ex. 1-Y);²⁵ (4) defendants' transfer of their home and its furnishings in Lebanon, Oregon, and other property to their eldest daughter, Lynn Langmack, during April - October, 1960 (Tr. 234-235, 332-335; Ex. 1-X); (5) defendants' establishment of a bank account in the name of Corda Gaubert at the Lane County Bank, Florence, Oregon, during September, 1960, and the use of such account to conduct their failing business (Tr. 64-67; Exs. 1-D, 1-LL); (6) various demands and legal actions against defendants (Exs. 1-W, 1-Z,

²⁵ Defendant Fred Stegeman revoked this assignment without notice to William Gaubert on September 27, 1960 (Tr. 184-185;) Ex. 1-Y).

1-AA, 1-CC, 1-DD, 1-RR, 2-0); (7) defendants' discussion with attorney Boock during late November, 1960, of their financial difficulties and various courses open to them including voluntary and involuntary bankruptcy (Tr. 278-285; Ex. 1-CC); (8) defendants' receipt of \$36,500.00 in United States currency in late November and early December, 1960 (Tr. 72-79; Exs. 1-G, 4); (9) defendants' sudden departure for Nelson, British Columbia, Canada, without their three minor children during December, 1960 (Tr. 86-89, 7, 237-278, 284, 285-286); (10) defendants' removal of their car and housetrailer to Nelson, B.C., Canada (Tr. 7-8, Exs. 1-S, 1); (11) defendants' leaving money with their eldest daughter upon their departure for Canada (Tr. 145; Ex. 1 - Interview of Fred Stegeman; Tr. 79-80, 245); (12) commencement of defendants' involuntary bankruptcy proceedings on December 15, 1960, and defendants' knowledge of such proceedings in January, 1961 (Tr. 13-58, 139; Exs. 1 - Interview of Ione Stegeman, 3-A, 3-B, 3-G, 3-H, 3-S, 3-W); (13) defendants' formation, with the assistance of attorney Boock, of FIMPS Investment Company during January, 1961 (Tr. 289-290, Ex. 1-M); (14) receipt by attorney Boock from defendants of two cashier's checks totaling \$26,598.68 (Tr. 238-239, 321-322, Exs. 7, 9), and the deposit of a major portion of such funds by attorney Boock in FIMPS' Albany, Oregon, bank account, during January and February, 1961; (15) appointment of a

trustee in defendants' involuntary bankruptcy proceedings on February 17, 1961 (Tr. 16, Ex. 3-S); (16) disclosure by attorney Boock to the bankruptcy trustee in early April, 1961, of the sum of \$26,598.68 and other monies (Tr. 19; Exs. 1-B and 1-N); (17) disclosure to the bankruptcy Trustee by attorney Long during March, 1961, of the sum of \$4,435.54 received by defendants' eldest daughter, Lynn Langmack, during December, 1960; (18) demands of the attorney for the Trustee for the sum of \$36,500.00 in United States currency and Cessna aircraft (Tr. 29, 30, 31, 36); (19) discovery by the Trustee of defendants' Cessna aircraft in December, 1962 (Tr. 36-37; (20) conflicting evidence and statements of defendant Fred Stegeman regarding his ownership of his Buick Car and housetrailer (Tr. 10; Exs. 1-S, 1-X); (21) defendants' continued concealment of the sum of \$36,500.00 in United States currency (Tr. 35, 36).

The foregoing constitutes substantial evidence of defendants' plan for the continued transfer and concealment of their property from their creditors and the Trustee of their bankrupt estates as charged in the Indictment (R. 1-3). Defendants' execution of their plan began in the Spring of 1960. It was climaxed by defendants' receipt from the Bureau of Public Roads on November 30, 1960, of \$41,624.79 due Fred Stegeman upon his failing road contracts followed by defendants' sudden departure for Canada (Tr. 181;

Exs. 1-B, 1-C, 1-D, 1-CCC). Defendants' concealment of portions of their property continued during attorney Morley's Canadian meeting with them in late March, 1961, and at the time he sent his letter of April 7, 1961 (Ex. 2-0). This concealment continued. Defendants' Cessna aircraft was not discovered by the Trustee until December, 1962 (Tr. 37, 54). Defendants' concealment of \$36,500.00 in United States currency was continuing at the time Exhibit 2-0 was admitted in evidence by the District Court (Tr. 35, 36). It is not unreasonable to say that defendants asked the District Court to exclude a communication about a crime and fraud they were then carrying on before that Court.

The Trial Court stated the Rule. "An attorney's advice about a course of continuing violation of the law is not privileged." (Tr. 362). Attorney Morley's letter of April 7, 1961 (Ex. 2-0) provided defendants with important advice of great specificity as to the consequences of their continued refusal to disclose their properties and to return to the United States. Such communications are not privileged. *Clark v. U.S.*, 289 US 1, 15; *U.S. v. Bob*, 106 F.2d 37, 40 (CCA 2, 1939), cert. denied 308 US 589 (1939); *Fuston v. U.S.*, 22 F.2d 66, 67 (CCA 9, 1927; *Hett v. U.S.*, 353 F.2d 761, 764 (CA 9, 1966), cert. denied 384 US 905 (1965); *SEC v. Harrison*, 80 F. Supp. 226, 230 (DDC, 1948); 8 Wigmore, Evidence, McNaughton

Rev. 1961, Sec. 2298. *State v. Sullivan*, 60 Wash. 2d, 214, 373 P.2d 474 (1962), relied upon by defendants, dealt with a past crime, not a continuing and future one as here. All that is required to drive the privilege away is "something to give color to the charge." *Clark v. U.S.* 289 US 1, 15; See *A. B. Dick Co. v. Marr*, 95 F. Supp. 83, 102 (DCSD NY, 1950).

The District Court was correct in finding that on April 7, 1961, there was strong evidence that defendants were still concealing assets in violation of the law and that an attorney's advice about this course of continuing violation of the law is not privileged. Appellants do not challenge this finding. See Appellant's Brief, page 24. The District Court was correct in admitting Exhibit 2-0 in evidence.

B. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE DISTRICT COURT'S FINDING OF WAIVER OF ANY PRIVILEGE RESPECTING EXHIBIT 2-0.

By the morning of the third day of trial, when the District Court admitted Exhibit 2-0 in evidence, the Court had also learned that (1) Attorney Morley had represented defendants "... for probably ten or twelve years prior [to 1960 - 1961 and] seen them weekly or monthly all of that time . . ." (Tr. 306); (2) At the time of defendants' departure for Canada in December, 1960, attorney Morley represented defendant

Fred Stegeman in the defense of two civil actions and the prosecution of another (Tr. 307; Ex. 1-RR, 1-QQ) and was working on this litigation until contacted by the Trustee's attorney (Tr. 314); (3) Walter Pendergrass attorney for the Trustee, contacted attorney Morley in the latter part of February or the forepart of March, 1961 (Tr. 307, 314); (4) attorney Morley was then asked by the Trustee's attorney if he would associate to continue these cases (Tr. 314) and replied "I told him that I would continue only on behalf of Mr. Stegeman if I were working for the Trustee" (Tr. 315); (5) attorney Morley was informed by the Trustee's attorney of certain facts which led Morley to become "... thoroughly convinced" that defendants would not get a discharge in bankruptcy because of their fraud (Tr. 315, 316); (6) attorney Morley undertook to go and meet defendants in Nelson, B.C., Canada, and the services which he there rendered to defendants "... I did in this instance, I did for Mr. Stegeman. That was the only reason I did it." (Tr. 315, 316); (7) attorney Morley met defendants in Nelson, B.C., Canada, during March, 1961 (Tr. 308); (8) at this time defendants knew of the existence of the bankruptcy proceeding, and Morley discussed with defendants their problems relating to the bankruptcy (Tr. 308; Ex. 1 - Interview of Ione Stegeman); (9) following his return, attorney Morley sent defendants a letter, an undisclosed copy of which he sent to attorney Pendergrass (R. 136; Ex. 2-0; Tr. 307, 308).

On April 7, 1961, the date of Exhibit 2-0, attorney Morley still represented defendants in three civil actions and provided them advice in connection with their involuntary bankruptcy proceedings. Attorney Morley testified that in his meeting with defendants in Canada and "... what he did in this instance" was "for Mr. Stegeman" (Tr. 315-316). Acting on behalf of defendants and in their best interest, attorney Morley sent an undisclosed copy of his letter of April 7, 1961 (Ex. 2-0) to the Trustee's attorney. Such action was intentional and not inadvertent. The text of Exhibit 2-0 shows upon its face that it was an attempt by attorney Morley on behalf of defendants to forestall criminal prosecution and reduce their potential liability after their bankruptcy proceedings were over (Tr. 315; Ex. 2-0).

Attorney Morley's advice, as contained in Exhibit 2-0, was rendered to defendants with respect to and in the course of his management of litigation and their involuntary bankruptcy proceedings. He had entered into important negotiations on their behalf; namely, defendants' return from Canada and cooperation in their bankruptcy proceedings in exchange for the Trustee's temporary withholding of action in defendants' three civil actions and bankruptcy proceedings and from reference of this matter to the FBI. The advice which attorney Morley gave defendants in his letter of April 7, 1961, was a particularly effective

means of negotiating with the Trustee. The notation "BC", which attorney Morley placed upon the copy of his letter, not only confirms the intentional character of his sending this letter to the Trustee's attorney, but also heightened its effectiveness as a persuasive document upon him.

These unusual and special circumstances create an implied and apparent authority in attorney Morley to act in defendants' best interests in these matters and to make disclosure to the Trustee of the contents of his letter of April 7, 1961. *Himmelfarb v. U.S.*, 175 F.2d 924, 939 (CA 9, 1949), cert. denied 338 US 860 (1949); *Fratto v. New Amsterdam Fire Insurance Co.*, 359 F.2d 842, 844 (CA 3, 1966); 8 Wigmore, Evidence, McNaughton Rev., 1961, Sec. 2325. Attorney Morley did act in defendants' best interests. As a part of such action, he disclosed to the Trustee's attorney the contents of a communication he had sent defendants. The District Court was correct in finding a waiver by defendants of any attorney-client privilege as to this communication (Ex. 2-0).

Assuming, *arguendo*, that attorney Morley's disclosure to the Trustee's attorney was "... an accident of my [his] own making" (Tr. 309), such disclosure (Ex. 2-0) is not protected. The risk of a careless attorney is placed on the client as in cases of loss or theft of documents from an attorney's possession. 8

Wigmore, Evidence, McNaughton Rev., 1961, Sec. 2325, 2326. An analogous rule is found in communications between husband and wife. *Woffle v. U.S.* 64 F.2d 566, 567 (CAA 9, 1933), affirmed 291 US 7 (1934); *State v. Wilkins*, 72 Ore. 77, at 82; 142 Pac. 589 (1914), and in communications overheard by third persons with or without the client's knowledge. *Clark v. State*, 261 S.W. 2d 339 (Tex. Crim. App., 1953), cert. denied 346 US 855 (1953); 8 Wigmore, Evidence, McNaughton Rev., 1961, Sec. 2326, 2339.

Finally, it may be suggested that defendants' waiver in advance of trial of any attorney-client privilege as to attorney John A. Boock (R. 9) constituted a waiver of the privilege by defendants as to their other attorneys, i.e. Lawrence Morley and Merle Long. Defendants, in their opening brief reaffirm a line of defense which they pursued at trial, namely, that their actions were governed by the legal advice of attorney John Boock. Appellants apparently deemed his testimony favorable. Appellants apparently further considered testimony of attorney Morely and Long unfavorable. Defendants should not be permitted to select from among several attorneys one whose advice they find favorable without waiving the privilege as to their other attorneys. The policy of the attorney-client privilege in promotion of a freedom of consultation between clients and legal advisors is not enhanced

by permitting defendants to select from among their advisors that advice which they deem helpful while retaining the cloak of privilege upon that which they deem harmful. It is enough that defendants may use the privilege as a shield. They should not be permitted to use it as a sword.

The District Court was correct in finding that attorney Morley had authority to act on defendants' behalf and did so in sending Exhibit 2-0 to the Trustee's attorney.

C. ADDITIONAL REASONS WHY THE DISTRICT COURT WAS CORRECT IN ADMITTING EXHIBIT 2-0 IN EVIDENCE.

1. Attorney Morley had a duty to make disclosure to the Trustee of matters contained in Exhibit 2-0.

Assuming, *arguendo*, that attorney Morley was co-counsel for the Trustee of the defendants' bankrupt estates,³⁰ he had a legal and ethical duty to disclose to

³⁰ It is not clear, as Appellants suggest, that attorney Morley was co-counsel for the Trustee of the bankrupt estates of Fred and Ione Stegeman. Attorney Morley testified that what he did in this instance was "for Mr. Stegeman" (Tr. 316). Our record contains no Order appointing attorney Morley as co-counsel for the Trustee. The District Court found that the Trustee's interest was "adverse to that of the defendants" (Tr. 362). Attorney Morley, as counsel for defendants, may have

the Trustee his communication to defendants respecting their continuing crime and fraud.²⁷ On April 7, 1961, defendants were continuing their concealment of their Cessna aircraft and \$36,500.00 in United States

had an interest in common with the Trustee in obtaining certain facts, but the interests and duties of defendants and their attorney Morley and the Trustee with respect to such facts were adverse. The Trustee is a representative of the creditors and a quasi-officer of the Court, not the bankrupts. His paramount duty is to conserve and advance the interests of the estate. See 11 USC §75; 2 Collier on Bankruptcy, 14th edition, §47.02, pages 1738-1739. Such adverse interests are illustrated by the question regarding a denial of defendants' discharge in bankruptcy because of their fraud, which had already arisen (Tr. 316).

²⁷ See 18 USC §3057:

"(a) Any referee, receiver, or trustee having reasonable grounds for believing that any violations of the bankruptcy laws or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report the others need not do so."

See ABA Canons of Professional Ethics No. 37:

"... the announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened."

See also ABA Canons of Professional Ethics No. 15:

"... [the] great trust of the lawyer is to be performed within and not without the bounds of law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client."

currency. As co-counsel for the Trustee, attorney Morley could not conceal from the Trustee his communication with defendants about their continuing crime and fraud, of which he had knowledge. He could not sit idly by and allow defendants to continue to defraud their creditors and the Trustee, for whom he was counsel.

Perhaps it should be again noted that Exhibit 2-0 was sent by attorney Morley to the Trustee's attorney, Walter Pendergrass. If, as Appellant suggests, attorney Morley was the Trustee's co-counsel, then any privilege as to such communication is that of the Trustee. The Trustee has made no claim of privilege in this action.

2. Exhibit 2-0 was not a copy of a confidential communication.

Attorney Morley's communication to the defendants, of April 7, 1961, was not intended by him to be confidential. Attorney Morley testified that he had previously promised the Trustee's attorney that he would give him "... the pertinent facts on the cases that I was handling" (Tr. 309). Morley further testified that he believed it advisable to send the Trustee's attorney a copy of his letter of April 7, 1961, "... because it was a convenient way to send him [the Trustee's attorney] a copy of the same letter, because it said the same thing." (Tr. 309). A communication

made for distribution to persons other than the client is stripped of any attorney-client privilege. *U.S. v. Tellier*, 255 F.2d 441, 447 (CA 2, 1957), cert. denied 358 US 821 (1958); *Leathers v. U.S.*, 250 F.2d 159, 166 (CA 9, 1957); *Himmelfarb v. U.S.*, 175 F.2d 9P4 (CA 9, 1949), cert. denied 338 US 860 (1949); *U.S. v. Shibley*, 112 F.Supp. 734, 741 (DC S.D. Cal. 1953), affirmed 236 F.2d 238 (CA 9, 1956), cert. denied 352 US 873 (1956). Exhibit 2-0 is not subject to the privilege because it was not confidential.

3. The contents of Exhibit 2-0 were obtained from third-party sources.

The contents of Exhibit 2-0 were obtained by attorney Morley from third persons and sources other than defendants. The contents of Exhibit 2-0, coupled with the testimony of attorney Morley (Tr. 306-320), indicate these third-party sources as public records, attorney John Boock (as to whom defendants waived any privilege, R. 9), and others. At no point does attorney Morley state he acquired a particular item of information mentioned in his letter of April 7, 1961, from defendants. He testified that he obtained a great number of facts bearing on defendants' fraud from the Trustee's attorney, Walter Pendergrass (Tr. 316). There is no privilege for such material. *U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 359 (D Mass., 1950); 8 Wigmore, Evidence, McNaughton Rev., 1961, Sec. 2317.

4. Appellant's reliance upon CONTINENTAL OIL CO. v. U.S., 330 F.2d 347 (CA 9, 1964) is misplaced.

No question was raised in that action of the existence of a continuing crime and fraud on the part of a client. In *Continental Oil*, the privileged memoranda were statements of clients to their attorneys. The matters set forth in Exhibit 2-0 indicate sources other than defendants. At no point does Exhibit 2-0 acknowledge defendants as the source of any of its contents. Finally, *Continental Oil* dealt with communications between attorneys engaged in a common cause whose interests were not adverse. In the instant case, the interest of defendants' counsel, Morley, was adverse to those of the Trustee.

CONCLUSION

Defendants had a fair trial. There is substantial evidence to support the District Court's rulings which are assigned as error. The evidence in support of the jury's verdicts of guilty is overwhelming and uncontradicted. Defendants' assignments of error are not well taken. For these and the further reasons set forth in Appellee's Brief it is respectfully submitted that the District Court's Judgments of conviction should be affirmed.

Respectfully submitted,

SIDNEY I. LEZAK

United States Attorney

JACK G. COLLINS

First Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date: Third day of January, 1968.

JACK G. COLLINS

First Assistant United States Attorney

APPENDIX

THE GRAND JURY CHARGES:**COUNT I****IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

UNITED STATES OF AMERICA,

vs.

CR 64-43FRED H. STEGEMAN and
IONE E. STEGEMAN,**I N D I C T M E N T****[18 U.S.C. § 152]***Defendants.*

A. On or about December 15, 1960, involuntary petitions in bankruptcy were filed in the United States District Court for the District of Oregon against defendants FRED H. STEGEMAN and IONE E. STEGEMAN by three creditors of said defendants pursuant to provisions of National Bankruptcy Act; on or about January 18, 1961, said defendants were adjudicated bankrupts by the United States District Court for the District of Oregon and thereafter a Trustee was duly appointed and qualified for the bankrupt estates of Fred H. Stegeman and Ione E. Stegeman.

B. On or about December 3, 1960, in the District of Oregon, defendants FRED H. STEGEMAN and IONE E. STEGEMAN did individually and as agents for each other in contemplation of bankruptcy proceedings against the said Fred H. Stegeman and Ione E. Stegeman knowingly and fraudulently transfer, conceal and remove from the District of Oregon to Nelson, British Columbia, Canada, the following property owned by said defendants:

1. \$36,500.00 in lawful money of the United States;
2. Two cashiers checks aggregating in value of \$26,598.68 lawful money of the United States;
3. One Glider Trailerhouse, Serial Number 462056568, of a value of approximately \$2,500.00; and
4. One 1959 Buick automobile, Four-Door Hardtop, Serial Number 7F2014858, of a value of approximately \$2,000.00;

with the intent to defeat the bankruptcy laws of the United States and to conceal said property from a Trustee and creditors of the bankrupt estates of the said Fred H. Stegeman and Ione E. Stegeman; in violation of Section 152, Title 18, United States Code.

COUNT II

A. On or about December 15, 1960, involuntary petitions in bankruptcy were filed in the United States District Court for the District of Oregon against defendants, FRED H. STEGEMAN and IONE E. STEGEMAN by three creditors of said defendants pursuant to provisions of National Bankruptcy Act; on or about January 18, 1961, said defendants were adjudicated bankrupts by the United States District Court for the District of Oregon and thereafter a Trustee was duly appointed and qualified for the bankrupt estates of Fred H. Stegeman and Ione E. Stegeman.

B. From and after December 15, 1960 and continuing until on or about the respective dates as set forth hereafter, defendant's FRED H. STEGEMAN and IONE E. STEGEMAN did, within the State and District of Oregon, knowingly and fraudulently conceal from the creditors and Trustee of the bankrupt estates of Fred H. Stegeman and Ione E. Stegeman certain property belonging to and owned by their said estates, to-wit:

1. Lawful money of the United States in the approximate sum of \$4,435.00, which said defendants caused to be delivered to defendants' daughter, Lynn Langmack, at Albany, Oregon, on or about December 10, 1960, and continuously con-

cealed by defendants until discovered by the Trustee on or about May 5, 1961;

2. Lawful money of the United States in the approximate sum of \$1,000.00 delivered by said defendants to John Boock at Albany, Oregon, on or about January 1, 1961, and continuously concealed by defendants until discovered by the Trustee on or about April 6, 1961;
3. Lawful money of the United States in the approximate sum of \$26,598.68 which said defendants caused to be deposited to a trust account in the Albany Branch of the United States National Bank, Albany, Oregon, on or about January 20, 1961, and continuously concealed by the defendants until discovered by the Trustee on or about April 1, 1961;
4. One Cessna Aircraft, Serial 33716 Model 182, NC5716B continuously concealed by defendants at Lebanon and Springfield, Oregon, until on or about February 26, 1961, and thereafter transferred by said defendants and William and Corda Gaubert to the State and Eastern District of Washington where said aircraft was discovered by the Trustee on or about December 27, 1962;

which property defendants Fred H. Stegeman and Ione E. Stegeman well knew was then and there owned by the estates in bankruptcy of Fred H. Stegeman and Ione E. Stegeman; in violation of Section 152, Title 18, United States Code.

A TRUE BILL.

/s/ Roger W. Cooper

FOREMAN

SIDNEY I. LEZAK

*Acting United States Attorney
District of Oregon*

/s/ Jack G. Collins

JACK G. COLLINS

Assistant U. S. Attorney

/s/ Rober C. Rose

ROGER C. ROSE

Assistant U. S. Attorney

JOHN A. BOOCK
ATTORNEY AT LAW
TITLE & TRUST BUILDING
ALBANY, OREGON
WARASH 8-2142

April 1, 1961

Honorable Estes Shedecor
Referee in Bankruptcy
United States Courthouse
Portland, Oregon

Re: Fred H. Stegeman B 51313
Ione E. Stegeman B 51314

Dear Sir:

On March 8, 1961 I was a witness in the above bankruptcy hearings as I recall, when questioned if I had any records, accounts or property of the bankrupts in my possession I replied in the negative. At the time there was no question in my mind whatsoever that said answer was correct.

During the past two nights I have wrestled with the above problem, finally last night I came to the conclusion that even though I thought I was technically right in my answer, I feel morally obligated to amend my testimony as follows: That I do not have any records, accounts or property, but that I do have the proceeds of two cashier's checks, sums of \$15,000.00 and \$11,598.68 - these checks were made payable to Pamela Stegeman and Marna Lee Stegeman, respectively, and I believe dated in October 1960. These two checks were delivered to me about 16, 1961 and I was requested to set up an educational trust fund for these two girls. That subsequent thereto I set up a corporation for that purpose and deposited the money therein and I still maintain control of those funds.

Inasmuch as the checks were in the girls' names and were endorsed by the girls, I assumed that the money had been transferred from Fred Ione Stegeman to the girls in October 1960 and that the girls were actual owners as the trust beneficiaries.

I can assure you that it took considerable prayerful thought last night before I clearly saw my moral duty to make this statement. I hope you trust that you may understand my position in this matter and that this has all been done in good faith.

Respectfully,

John A. Boock

cc:

Walter H. Pendergrass
Attorney at Law
527 Pacific Bldg
Portland, Oregon

Exhibit	IV
Date	4-1-61
Rptr	
Date	
Clerk	

John Boock
Te Acct
Citizens Bk., Albany

1st Fed S&L
Albany
(FIMPS)

H Journal)

N) 1/16/61

/60

) (Marna) Ex 1-N)

)

(Ex 1L) 1/20/61 \$10,000

-JJ

(Ex 1-L) 2/1/61 \$10,000

(Ex 1-L, 1-N) 2/2/61

\$ 1,852.87

\$300 2/6/61 (Ex 1-L)

Langmack (Ex 1-N)

(Ex 1-L) 4/12/61 \$21,552.87

(Ex 1-N) 4/12/61 \$28,809.33 Trustee

JOHN A. BOOCK
ATTORNEY AT LAW
TITLE & TRUST BUILDING
ALBANY, OREGON
WARREN B. 6142

April 1, 1961

Honorable Estes Snedecor
Referee in Bankruptcy
United States Courthouse
Portland, Oregon

Re: Fred H. Stegeman B 51313
Dear Sir: Ione E. Stegeman B 51314

On March 8, 1961 I was a witness in the above bankruptcy hearings and as I recall, when questioned if I had any records, accounts or property of the bankrupts in my possession I replied in the negative. At that time there was no question in my mind whatsoever that said answer was correct.

During the past two nights I have wrestled with the above problem, and finally last night I came to the conclusion that even though I thought I was technically right in my answer, I feel morally obligated to add on my testimony as follows: That I do not have any records, accounts or property, but that I do have the proceeds of two cashier's checks in sums of \$15,000.00 and \$11,598.68 - these checks were made payable to Pamela Stegeman and Marna Lee Stegeman, respectively, and I believe were dated in October 1960. These two checks were delivered to me about January 16, 1961 and I was requested to set up an educational trust fund for these two girls. That subsequent thereto I set up a corporation for that purpose and deposited the money therein and I still maintain control of those funds.

Inasmuch as the checks were in the girls' names and were endorsed by the girls, I assumed that the money had been transferred from Fred and Ione Stegeman to the girls in October 1960 and that the girls were the actual owners as the trust beneficiaries.

I can assure you that it took considerable prayerful thought last night before I clearly saw my moral duty to make this statement. I hope a trust that you may understand my position in this matter and that it has all been done in good faith.

Respectfully,

John A. Boock

cc:
Walter H. Pendergrass
Attorney at Law
527 Pacific Bldg
Portland, Oregon

Exhibit	LV
Date	CR 4-93
	Rptr
Date	Clerk

	US National Albany	Lane City Bk. Florence	Citizens Bk. of Albany	1st. National of Lebanon	John Boock Te Acct Citizens Bk., Albany	1st Fed S&L Albany (FIMPS)
Treasury Check Aug. 25, 1960 \$32,968.83 (Ex 1A)	(Ex 1GG) 9/1/60 \$13,176.87 (Ex 1GG) 8/30/60 \$19,791.46	(Ex 1C, 1D)		(See Ex 1-H Journal) R-7		
Treasury Check Aug. 30, 1960 \$5,049.45 (Ex 1A)	(Ex 1A) 9/7/60 \$5,049.45	(Ex 1C, 1D)				
Treasury Check Oct. 5, 1960 \$49,969.64 (Ex 1A)	(Ex 1A) 10/8/60 \$49,969.64	(Ex 1C, 1C, 1F) 11/12/60 (Gaubert) (Ex 1D, 1C, 1E) 10/28/60 (Gaubert) (Ex 1-I Acct 100) (Ex 1-H R-7) (Ex 1C) (Ex 1E) 10/27/60 \$32,660.11 17,000.00 deposit 289.53 cash	8014 (Gaubert) 7849 (Gaubert) \$2,680.11 7850 \$15,000 (Pamela) 7848 (Marna) (Ex 1E) 8014 \$3,200.00 8015 \$201.32	10/27/60 (Ex 1-N) 1/16/61 11/10/60 (Ex 1F) (Marna) Ex 1-N) (Ex 1F) (Ex 1-JJ)		(Ex 1L) 1/20/61 \$10,000 (Ex 1-L) 2/1/61 \$10,000 (Ex 1-L, 1-N) 2/2/61 \$1,852.87 \$300 2/6/61 (Ex 1-L) Langmack (Ex 1-N)
Treasury Check Nov. 22, 1960 \$41,624.79 (Ex 1-B)	(Ex 1B) 11/30/60 \$41,624.79	(Ex 1C, 1D) 5,124.79 25260 \$6000 25261 \$6000 25262 \$6000 25263 \$6000 25264 \$6000 25265 \$6500 (Ex 2A) 12/10/60 \$4,435.54 (Ex 1C) 12/6/60 \$1,055.00 (Ex 1-LL) 3 cks. \$79.76 (Ex 1-LL) Cessna (Ex 1-I Acct 204-N)	12/3/60 Cottage Grove 1st Nat Eugene 12/2/60 Cottage Grove 12/3/60 Lane City Florence 12/2/60 Lane City Florence 12/2/60 1st Nat Eugene			(Ex 1-L) 4/12/61 \$21,552.87 (Ex 1-N) 4/12/61 \$28,809.33 Trustee

JOHN A. BOOCK
 ATTORNEY AT LAW
 1001 N. BROAD STREET
 ASTORIA, OREGON
 WYOMING 3.8142

April 12, 1961

Walter Pendergrass, Spackman, Bullivant & Wright
 Attorneys at Law
 Pacific Building
 Portland 4, Oregon

RE: Fred H. Stegeman, No. B 51313
Ione E. Stegeman, No. B 51314
 Attention: Walt Pendergrass

Pursuant to your letter of April 7, 1961, I am submitting the following accounting of moneys received and disbursed on the above matter:

1-1-61	Gaubert Payment	\$1,000.00
1-16-61	Cashiers check #7850	15,000.00
1-16-61	Cashiers check #8013	11,598.68
2-1-61	Lynn Langmack check	<u>1,852.87</u>
	Total.....	\$29,451.55

DISBURSEMENTS:

1-18-61	Oregon Corp. Comm. filing fee	\$ 20.00
2-6-61	Lynn Langmack Check	300.00
2-22-61	Lynn Langmack check	<u>322.22</u>
	Total Disbursements.....	<u>642.22</u>
	Balance on Hand.....	\$28,809.33

I have prepared my trustee check in the above amount to the order William Kennedy, Trustee and am enclosing it herewith.

Also, I am enclosing my claim for services in the sum of \$350.00. It is difficult to put a value on such services I can assure you. I could never knowingly engage in a comparable matter for a hundred fold at claim.

I appreciate the courtesy and cooperation you have shown me in this matter. I have written the Stegemans recommending that they cooperate with you in bringing this matter to a satisfactory settlement.

Sincerely,

John A. Boock
 John A. Boock

B/rr
 Enclosure

sent to Kennedy

LAURENCE MORLEY

WILLIAM R. THOMAS

M. NA

MORLEY, THOMAS & ORONA
ATTORNEYS AT LAW
PHONE ALPINE 8-3194
80 E. MAPLE ST.
LEBANON, OREGON

April 7, 1961

Mr. and Mrs. Fred Stegeman
Kline Trailer Park
Nelson, British Columbia

Exhibit	2-0
Case	CR 64-43
Date	Rptr Clerk

Dear Mr. and Mrs. Stegeman:

It has been some time since I returned from your place, and I promised you that as soon as I could get adequate information collected together I would forward it to you, and pass along my suggestions. A lot of things, apparently, have taken place since I left your premises. I will do my best to outline a few things as I can.

First, I told you I would try to investigate and find out how many claims had been filed against you in the bankruptcy proceedings and the extent of the claims. To the best of my knowledge only one claim has actually been filed to date. That claim is the claim of the First National Bank in the sum of \$34,500.00, plus some interest. No other claims have been filed, but a number of other claimants have written in and intimated that they intend to file. We cannot take any action in regard to any of them until we know exactly what they intend to do.

The Bachmann Brothers are in the process of filing their claim, and I believe that it has been forwarded to the Trustee in Bankruptcy. Their claim is in the sum of \$19,030.25.

In regard to the Bachmann claim, I have gone over the matter with the Trustee in Bankruptcy and the other attorneys interested therein, and am satisfied, and I believe that they are satisfied that we will be able to dispose of this item with or without your presence. It would be a lot easier with your presence, but we probably can defeat it anyway, in light of the testimony that you have already given in your deposition plus the other information that we have and can acquire. I would therefore reach the conclusion that the Bachmann claim

f little or no consequence.

Dolan Construction Company have written in indicating that are intending to file a claim for \$25,940.25 and incidentally Feenaughty Equipment people have also inferred that they are intending to file a claim.

ve already advised the Trustee in Bankruptcy, and his counsel these claims are duplicates, and that in addition to that, s your opinion that the claim is of no greater value than 000.00. It is either due Dolan, or Feenaughty, but you do know which. I have explained to him that you agreed to Dolan .90 cents a yard for the crusher and jaws, but he not provide the jaws. That you later made a deal with aughty which would be .70 cents a ton, and then you made own independent agreement in connection with the jaws. either way you do not believe that the item would run more \$10,000.00, or \$11,000.00.

ave examined the bond with the United Pacific People in ection with this item, and unless there is some other in- retation that I cannot find it would not appear to me that bonding company has any responsibility on this rental gation.

Stone Machinery Company have intimated that they are going ile a claim for \$903.00. I do not know a thing about this I would appreciate some information from you.

Rogers Tire Poople have sent in a bill, but no claim as for \$17,984.84. According to my understanding these tires that were put on equipment that went to the Pappe le, and if for no other reason you should receive some tional credit from Pappe. No doubt you do owe the tire , and if there is anything wrong with this particular unt. I would appreciate your giving me further information.

Howard Cooper people have a claim for \$809.89. I do not what this is all about, and if you can give me some rmation I would appreciate it.

. McEwen has a claim for \$7,200.00, or intimates that would have one. I think that I am spelling the name right, it may be that I misunderstood it, or do not read the hand- ing correctly. Please let me know what this is all about.

Mansfield did file a claim for \$984.01. It is my recollection from my conversation with you that you do not owe him anything. It is my understanding that the policy he issued to you did not provide for a premium ratio on it, and you were dissatisfied on it, and you asked that it be cancelled, but nevertheless, he billed you anyway. A little more detail on this would be appreciated.

In examining the correspondence with the Halton Tractor Company it appears that you owed them in excess of \$60,000.00, about \$42,000.00 on the contract, and about \$21,000.00 on the mortgage. It seems that on December 9, 1960, prior to the filing of the bankruptcy proceedings they became panicky over the fact that some of the equipment was being moved, and that they could not locate you, and they proceeded to pick up the equipment, dispel your fears that the Bank had something to do with this let me assure you that the bank did not, and they were just as surprised as you were. In fact, they were even surprised to find out that they had picked it up before the bankruptcy proceedings started and we just discovered that fact. When they picked it up, apparently they sold the stuff at some kind of a sale, which is not completely explainable, and claim that you still owe a balance of \$48,300. It seems that they only got about \$21,000.00 out of the equipment. We have quite a bit of evidence compiled, plus the letter you wrote to me which indicates to me that they had more than adequate security for their money that was due them. I believe it was admitted that the equipment was worth approximately \$50,000. We realize that upon a forced sale it would not bring that much but it ought to have brought enough to pay off the full obligation, hence, we are not greatly disturbed about their claim against you. We believe that we can get them to settle that without asking for a deficiency judgment, and I suspect that they will not take such steps.

The Pappe claim has not yet been filed, and it is in the amount of about \$65,000.00. Just why it has not been filed we do not know, and we cannot quite understand their attitude in respect to it. We are going to resist it all of the way, although we may take some sort of a settlement.

Of course, United Pacific Insurance Company, on their bond, has an open claim, but as far as I can tell they have not yet had to pay out any of the money, and I doubt if they will have to pay out any money, and under those circumstances

There probably is no obligation to them. There might be some other outstanding bills, the only other one we know of, however, is the small bill of Doug Cruise for \$305.00. There may be some others that you might inform me about if you would, and if you know of them I would appreciate being advised so that we can check with the people and get it cleared up. This is quite important because unless the people file their claims in this bankruptcy or have notice of the bankruptcy so that they can file their claims the claim will not be discharged in the bankruptcy, and some time in the future you may still have to face them regardless of the outcome of this situation.

I have outlined to you all that I can about the above claims, and all that I know about them. Anything that you have and can tell me I would be glad to pass on to the Trustee, so that proper measures can be taken to protect what assets there are in the estate.

I am intending to proceed against Bond and see what I can get out of him on your account with him. I am satisfied I can get the \$500.00, but if he does not come through righty quickly we might get considerably more.

I presume you know by now that Johnny Boock contacted the Trustee in Bankruptcy by letter, and also contacted me on the 5th day of April. He became very frightened because of his position in this matter, and I might say that he had cause to be. As far as I am concerned what he did to help you and the children was perfectly all right, and I am glad that you found someone that you could trust in that respect, however, after he was called before the Bankruptcy Referee, and put under oath, he was obligated to reveal all of the facts that he knew about the situation, or otherwise there might be some danger of accusing him of a conspiracy to defraud. Under those circumstances Johnny could have probably suffered a severe penalty, as well as lose his license to practice. He had no other choice but to reveal the full facts, fully and completely, and to the best of my knowledge he has done so and is remitting to the Bankruptcy Trustee all of the money that he has under his control, which I understand is around \$26,500.00 for the children, and about \$2,100.00 of other money that was left with him.

I might further say that I am confident that the Trustee in Bankruptcy and his attorney are not going to relax in any degree. I know that they are going to turn the matter over to the F.B.I. in a very short time. The only reason they have not done so is that I have begged them not to do it until you have had a full chance to deliberate and reflect on what you want to do. I know that I have done all that I can to convince them that neither you, nor Mrs. Stogeman are the kind of people who should get involved with the law, especially in a criminal matter. I have asked them to hold off because I thought you would probably be able to arrange to send all of the books in to the Trustee. If you do that that will greatly eliminate a possibility of criminal procedure, but I do not think that they are going to hold out very long.

In addition to that I am confident that they are going to locate the rest of the assets in the estate. I understand that Lyn has already turned over a deed to the house to the Trustee. They have a way of tracing all of the checks and all of the funds, although it takes them considerable time and trouble, and I am sure that they will, and when they do innocent people may get hurt.

When I read this letter over, and when I reflect upon the things that I have told you I find myself in a very confused position. Frequently it does not appear that I am on your side, because I keep telling you to do things which you apparently do not want to do, but, frankly I want you to understand that I have not asked you to do anything that I did not think that you should do, and the things that I have suggested to you are for your own personal sake. You will find out after a while that I am telling you the absolute facts and that even though it may not appear to be to your present advantage, in the long run, if you do not consider fully what I have been telling you you may have some very disastrous results.

I still repeat, I think that you should get the books to the Trustee immediately. I will accept them for you if you want to send them to me. I think you should make a full report where the other assets are just as soon as possible, and I will forward those for you if you want me to. I further

state that I think that the best thing for you to do is for you to personally appear back in Oregon, and get the matter thrashed out once and for all. If you come back you will not suffer any criminal responsibility, although you may suffer considerable financial set back, but I do not think it will be any worse than you are going through now.

Please remember you are not a man without friends. You have a multitude of them. I know of no one who thinks that you are doing the right thing for yourself, or your family. All of your friends will still rally for you if you come back. If you cannot see your way clear to do that please do the other things that I have suggested.

I dictated this letter a few days ago, but we were behind in the typing in the office, in the meantime I have requested the Trustee not to proceed through the F.B.I. until I have had a chance to hear from you. They have been very kind to me in this respect, and I am also confident that they have no desire to be punitive about this, however I am sure they will take some action by Monday or Tuesday of next week, that is the 17th or 18th, unless you and I give them some reassurance that it will not be necessary.

Sincerely yours,

MORLEY, THOMAS & ORONA

By:

Laurence Morley

LM:k

BC: Walter Pendergrass

**EXHIBIT 1 — INTERVIEW IONE E. STEGEMAN
DATE 12/13/62 AT NELSON, B.C. CANADA**

Mrs. IONE E. STEGEMAN was interviewed in her mobil home at Kline's Trailer Court at the southern outskirts of Nelson, British Columbia, in the presence of Corporal CHARLES PEEVER, Royal Canadian Mounted Police, Detachment of Nelson, B. C.. Mrs. STEGEMAN was advised that the interview would concern the alleged concealment of assets in relation to the possible violation of the National Bankruptcy Act, such allegations involving her and her husband FRED H. STEGEMAN. She was further advised that she did not have to furnish any information, and that any information so furnished by her could be used in a court against her and her husband, and that she had the right to consult an attorney.

As having been instructed by Acting U. S. Attorney SIDNEY I. LEZAK of Portland, Oregon, it was pointed out to Mrs. STEGEMAN that prosecutive action was being considered in this case, and that this interview might be her last opportunity to make a complete disclosure. It was also pointed out to her that it was Mr. LEZAK's opinion from a study that the extradition treaty between the United States and Canada would apply in this case.

At the beginning of the interview and at two or three times throughout the interview, Mrs. STEGEMAN stated that she was willing to cooperate; however, she further pointed out that she has previously furnished all the infor-

mation that she knows to "the attorneys and those other men" who had previously called upon her and her husband in Nelson, B. C., several months ago to interview her concerning this matter. At each such occasion it was explained to her that the interview would have to be voluntary on her part, and that the interview was being conducted to give her an opportunity to make a complete and full disclosure.

Mrs. STEGEMAN stated that she and her husband came to Canada in the early part of December, about the third or fourth day, 1960, and at the time, they came with the intention of looking for work. They had never been in this area before, and at the time, they did not know how long they would stay. Mrs. STEGEMAN said that Mr. STEGEMAN was interested in working in mining, farming, construction work, or anything else he could find employment in. She said after Mr. STEGEMAN was able to find employment and began to work, he sent word to Mr. WILLIAM GAUBERT that if he would come on up to Nelson, they were sure that he would be able to find employment. She added that Mr. and Mrs. GAUBERT came to Nelson the following year, the exact date she could not recall, but to the best of her recollection, it was probably some time in March, 1961.

At this point, Mrs. STEGEMAN said they had got all this information before and they had trumped up a lot of charges against us. However, when asked if she wished to continue the interview, she replied in the affirmative.

At the time they came to Canada, she said they brought with them their 1959 Buick car, the trailer house in which they are presently residing, and their personal effects. She said they also brought with them about what money they thought they would need to carry them through the winter. However, she declined to state specifically how much cash they had in their possession. Since they have resided in Canada, she said Mr. STEGEMAN has been employed most of the time, and that his work has been as a heavy-duty mechanic at various places for various companies including Celgar Industries of Castlegar, British Columbia, and Finney Tractor Company of Nelson. She said that he worked wherever he could.

In regards to their first knowledge of the bankruptcy proceedings, Mrs. STEGEMAN said they first knew of the bankruptcy proceedings when they received a notice in the mail addressed to them at Nelson, British Columbia, during the latter part of January, 1961, approximately two months after their arrival in Nelson. She said that although she does not remember for sure, she believes that this letter was mailed from the Bankruptcy Court in Oregon. At least she said it was a typed-form letter addressed to them, and she added that neither she nor her husband has ever been served with any kind of notice personally.

She said that it is their intention and desire to continue living in Canada, and that they have become landed immigrants in Canada, and that "everything has been latched on to by

those people down in Oregon, and there is nothing to go back to Oregon for."

She said that they have four children, all daughters:

Mrs. ELIZABETH LYNN LANGMACK,
Albany, Oregon;

Mrs. SUZANNE PENNY, Nelson, British
Columbia;

MARNA STEGEMAN, in school at Nelson;

PAMELA STEGEMAN, in school at
Nelson.

Mrs. STEGEMAN said that the three younger girls moved to Nelson and have resided there most of the time that Mrs. LANGMACK has continued to reside in Albany, Oregon, but has on three or four occasions visited with them in Nelson. As to the time of the arrival of the three girls in Canada, Mrs. STEGEMAN said they did not come to Nelson when the parents moved there in early December, 1960, but that the girls had remained behind at their home in Oregon until Christmas time of the same year, at which time they came to Nelson and continued to live there until this date.

Mrs. STEGEMAN said that neither she nor her husband heard from the three girls (their daughters) that a United States Marshal or any other representative from the United States Government was attempting to contact them or that bankruptcy proceedings were being filed against them. In fact, she said they did not learn any such information

until it was mailed to them as mentioned above during the latter part of January, 1961. In fact, she said when she and her husband left home in November, they took off in the car pulling the trailer looking for work and they traveled in Washington, Oregon, and Idaho, prior to going to Nelson, British Columbia. She said that she recalls that their time of departure was shortly after November 14, 1960, because she said she was a hostess for a UNICEF dinner at her home on or about November 14, 1960, and that it was shortly thereafter that she and her husband left home in Oregon looking for work. She said she went along with her husband helping him to drive, and throughout their travels in Washington, Oregon, Idaho, and into British Columbia, their children did not know their whereabouts. She said she does not now remember the specific date, which they advised their daughters where they were, but it was some time in December and shortly before the daughters left their home in Oregon to come to British Columbia to live with them.

She denied that their daughters in anyway contacted them to tell them about the bankruptcy proceedings because she said her daughters did not know their whereabouts.

In regards to the airplane, a Cessna 182, which had belonged to her husband, she said that Mr. STEGEMAN sold this aircraft to WILLIAM GAUBERT in about March, 1961. To describe this sale or transaction, she said that Mr. STEGEMAN had sold some heavy construction equipment to GAUBERT while were residing in Oregon, and then Mr. STEGE-

MAN had borrowed back from GAUBERT a caterpillar tractor to be used on a construction job. While Mr. STEGEMAN was using this "cat" on a job in Oregon, he broke the cat in half and then as payment for the use of the equipment and the damage done to it, Mr. STEGEMAN turned over to WILLIAM GAUBERT the instant airplane.

Mrs. STEGEMAN said that they did not get the title for the instant aircraft until after they had moved to Canada, and after they had been declared bankrupt. She explained that the payments had been completed on this aircraft at about the time they left Oregon, and it took two or three months at least until the title was sent to them in Nelson. Because of this delay in receipt of title, she said it was never turned over to GAUBERT at the time the aircraft was turned over to him.

After WILLIAM GAUBERT and his wife moved to Nelson in March, 1961, Mrs. STEGEMAN said that her husband advised GAUBERT that he would like to use the aircraft, and an agreement was reached between GAUBERT and STEGEMAN that STEGEMAN could use the aircraft in the Nelson area if he would give it the necessary care and upkeep. Mr. STEGEMAN had the aircraft flown from Oregon to Nelson with the pilot landing at Trail, B.C., and clearing Canadian customs and immigration at that port. After the plane arrived in Nelson, she said her husband went to see the Canadian officials and was told that because he was now an immigrant in Canada, he could not keep the aircraft in Canada on a six-months permit; therefore, she said because

the cost of bringing it into Canada on a permanent basis was prohibitive, it was decided that the aircraft should be returned to the United States so she said it was taken right back. In regards to the identity of the person, who had flown the aircraft from Oregon to Nelson, Mrs. STEGEMAN said that she does not remember the man's name, but that they had had a man ferry it into Nelson. In regards to the time and conditions in which the aircraft was returned, she said that it was about one or two days after the plane had arrived in Nelson that it was flown back into the United States, and to the best of her recollection, the date of departure was postponed because of weather. She said her husband FRED STEGEMAN flew the aircraft from Nelson back into the United States and checked in at Spokane, Washington. When asked where the aircraft was then taken or where the aircraft is located at the present time, Mrs. STEGEMAN said "I don't know what he did with it after landing at Spokane." When asked if she actually did not know what he had done with it or whether she did not care to say what he had done with it after landing at Spokane, her reply was "I cannot answer that."

Mrs. STEGEMAN said that they still owe on the house trailer, and that it is financed through the Commercial Credit Corporation of Portland, Oregon, to which company they are now and have been since moving to Canada making payments on a monthly basis. She said these payments are made by check or money order, and that the money order is always of a United States denomination, usually obtained from a bank or a Post Office. In

fact, she said that she has made several trips personally to Spokane, Washington, at which time she has obtained these money orders for payment on the trailer house.

Mrs. STEGEMAN said that Mr. STEGEMAN is now working on a logging job about 12 miles out of Burton, B. C., for the Celgar Company, and that he comes home only on week ends. She said that the place where he is employed at this time of year is inaccessible by automobile because of road and weather conditions. She added that he would have no additional information to furnish other than what she is able to and is furnishing in this interview.

At this point, Mrs. STEGEMAN was advised that information had been received to the effect that she had written a letter stating that her husband has a deteriorated mental condition, and she was asked to comment on this. She stated that he has worried so much about his backsets and the hardships that have been brought to him by the people in Oregon, that she believes that he has approached a nervous breakdown. She admitted that she did not think he had actually reached the point of a nervous breakdown, but that he had closely approached this. However, she said for the past couple of months he has been a little better because his health in general has been better and because he has been able to get out and work for a living. She said he was quite sick this summer with a bone infection in his right arm, to the extent he was unable to work during the months of June, July, and August. Then he worked for one month and was off

again for a month or so due to a back injury, which he said amounted to a slit disk.

She said that her husband has worked so hard and so long in his life that he cannot quit working, and when he is unemployed, it greatly concerns him. She added that he has a good keen mind, and she does not think that in anyway he is mentally ill, but that because of the pressures that have been placed upon him during the last year or two, he has had a severe nervous condition. She said that he has been in need of medical help, but she very much dislikes mentioning anything about their troubles down in Oregon because it seems to depress him to the extent that he becomes greatly worried about it again, and at such times, she wonders about a nervous breakdown. When asked if he has ever consulted a psychiatrist, she replied in the negative. She said that she does not think that he is actually in need of a psychiatrist, but that he needs to forget his troubles and he is happier when he is doing something.

Mrs. STEGEMAN said "We have a lot of equipment down there in Oregon, which was almost paid for at the time we left to look for work, and after we left there, they came in and took it away." She said by this statement she was referring to the fact that it was their desire to continue in the construction business at the time they left Oregon, and that they intended to go elsewhere to look for work inasmuch as there was no work in their own immediate vicinity, and after finding work, they intended to go back and get their equipment and take it to the new job. However, before they could

become thus employed and settled she said that "They" took all of their equipment without authorization, and they, the STEGEMANs, were unable to put it to further use. She said when they first came into Canada, they came on a visitor's permit, and they applied in the latter part of January to become landed immigrants, and further that they took their physical examinations to become landed immigrants after they heard they had been declared bankrupt. She added that when they came to Nelson, they still had the equipment in Oregon, and they wanted to bring it up into Canada to use it up there, but that they could not move it until they had a job to move it to, and then the equipment was taken away from them before they could move it and use it in this area. She said that it was their intention to move it to this area to put it to use in order to be able to finish paying for the equipment.

At this point, Mrs. STEGEMAN indicated that she had furnished all the information she decided to furnish, and that she had no desire to have the interview pursued further. She stated that while she and her husband were living in Nelson and her four daughters were still living in Oregon, that the daughters were greatly harassed by the authorities in that area, that the police and everyone else seemed to be against them, and that whenever the daughters left the home unattended that someone broke into the place on several occasions ransacking the house and causing a great deal of disturbance. She added that the harassment of her children was extremely disturbing and uncalled for, and she had no desire to return to the United States to live. She added that it now appears that the United States

authorities are trying to come to Canada and make things so undesirable for her and her family that they will not be able to live there either. She said that it appears as though the United States authorities plan to come to Canada and arrest her and her husband like common criminals and return them to Oregon to face charges.

The following description was obtained through observation and interview:

Name	Mrs. IONE E. STEGEMAN
Maiden Name	RODMAN
Race	White
Sex	Female
Nationality	American (landed Canadian Immigrant since early 1961)
Height	Approximately 5'6"
Weight	Approximately 140
Hair	Black
Eyes	Brown
Marital Status	Married, wife of FRED HENRY STEGEMAN
Remarks	Because of her apparent unwillingness to furnish further information, and because most of the descriptive information concerning this woman has already been obtained, no further effort was made to obtain any further description.

**EXHIBIT 1 — INTERVIEW FRED STEGEMAN
DATE 2/20/63 AT CASTLEGAR, B.C., CANADA**

Mr. FRED HENRY STEGEMAN was located at his place of employment with Celgar, Ltd., near Castlegar, British Columbia, Canada, and he was requested to come to the office of the Royal Canadian Mounted Police in Castlegar for interview, which he did.

At the beginning of the interview, STEGEMAN was advised of the nature of the interview, that it was to give him an opportunity to make a full and complete disclosure of all assets and liabilities in regards to an involuntary bankruptcy case that had been filed against him and his wife in the State of Oregon. He was advised that he did not have to make any statements, and that any information that he did furnish could be used against him in a court of law. He was also advised that he had the right to consult an attorney.

STEGEMAN said he was very much willing to cooperate all he could in furnishing all the information he knew relative to the above mentioned bankruptcy. He said he had furnished all the information he knew on previous occasions to attorneys who he thought represented the Trustee in Bankruptcy, but he was willing to furnish it again.

When asked if he recalled the disposition of a United States Government check in the amount of about \$36,000.00 or \$36,500.00, made payable to him a short while prior to his departure from his home in Oregon in the fall of 1960, STEGEMAN said he did not recall

any such check; however, when told that written records reflect such a check was issued to him at that time, and that said check had been cashed, STEGEMAN replied that the money from that check was "spent paying bills" which had been incurred through his construction business. He added that some of it was spent by him looking for work. He said he does not now recall just how much, but that he and his wife spent well over \$6,000.00 just travelling around looking for work after receipt of the above mentioned check, and that most of that was spent in December, 1960.

It was pointed out to STEGEMAN that records also indicate when the United States Government check, in the amount of \$36,500.00, was cashed in the fall of 1960, that five (5) cashier's checks, in the amount of \$6,000.00 each, and one (1) cashier's check, in the amount of \$6,500.00, were obtained, and he was asked as to the disposition of those

STEGEMAN said he and his wife were gone from home for about one and one-half months in November and December of 1960, looking for work, and they have never returned to Oregon; they eventually settled in Nelson, British Columbia, Canada, where they have continued to live to this time. He said he has been working most of the time since they settled in Nelson in about December, 1960. He said he has been working the past few days at the main plant of the Celgar, Ltd., located about four miles northwest of Castlegar, British Columbia, but on February 21, 1963, he planned to return to work at the Celgar logging camp near Burton, British Columbia.

checks. His reply was that two (2) of those checks were cashed, and the cash derived from them was used to pay two (2) men to whom he owed money; he added that he does not now recall their names. The remainder of the four (4) above mentioned checks he said, were subsequently cashed and the money used to pay to other people to whom he owed money, and he does not recall any of their names. He added that all of the recipients were then right around the Lebanon, Oregon, area. He also added that for some of those debts to be paid, he left the money with his daughter, LYNN, to pay, but again he did not recall how much nor to whom it was to be paid, and some of the debts he paid before he and his wife left Lebanon.

In regards to the above mentioned six (6) cashier's checks, STEGEMAN said he does not recall the circumstances of cashing those checks, but he does recall cashing a couple of them himself, and Mrs. CORDA GAUBERT may have cashed one or two of them because he recalls asking her to do so. In explaining this, STEGEMAN said Mrs. GAUBERT took care of all the time records for him while they were working at Whitaker Creek (in Oregon), and she also took care of the banking for him as well as running a lot of errands and other odd jobs. He added that he was not with Mrs. GAUBERT at the time she cashed those checks, and he does not know who was with her. He also added that Mrs. GAUBERT did not keep any of the money from those checks she cashed. He said, "I got it all from her".

He said he had no explanation why, when those checks were cashed, the proceeds of the

checks were obtained in \$50.00 and \$100.00 currency, except that he "wouldn't have so many small bills". He said he had a checking account in the Lane County (Oregon) Bank at that time, but because the job was finished at that time, he knew he was going to leave the area, so he paid off the people he owed money to, paying them in cash, and he saw no need to further use a checking account. He added, "I've done it that way lots of times", indicating that he meant he had paid off his debts in cash at the conclusion of a job in a specific area.

STEGEMAN admitted that he might have taken \$400.00 to \$500.00 of the \$36,500.00 check with him into Canada when he and his wife moved to Nelson, British Columbia. He added, "That's about all I had in my pockets when I got up here". He also admitted he had one other check in the amount of \$2,000.00 paid to him by a Mr. GILE, owner of a plywood company in Sweethome, Oregon. This was cashed in the United States, but he does not recall where.

In regards to the Cessna 182 airplane which he had owned in Oregon, STEGEMAN said as far as he was concerned, the plane belonged to the GAUBERTS; they had a Bill of Sale for it, this Bill of Sale having been given by STEGEMAN to WILLIAM GAUBERT in about July of 1960. He explained that at the time of the issuance of the Bill of Sale to GAUBERT, STEGEMAN had not finished paying for the plane, but to the best of his recollection he finished making the payments on the plane in about October of 1960, and he vaguely recalls that he received the Registra-

tion, which comes in three copies, at the time he made the final payment in about October 1960. However, he does not now recall what happened to the Registration. He believes he left it in the STEGEMAN home in Lebanon. He has not seen it since he left Oregon, and he does not know its whereabouts.

In explaining the transfer of ownership of the airplane to GAUBERT, STEGEMAN said he had sold GAUBERT some heavy duty road construction equipment in the form of D-8 cats, trucks, and miscellaneous equipment during about the last part of February, 1960. He added that he was not sure of the year, but he believes it was 1960. Then later in that same year, STEGEMAN borrowed that equipment back from GAUBERT, rent free, with the understanding that STEGEMAN would return the equipment in a good state of repair. However, in about July or August of 1960, STEGEMAN returned the equipment to GAUBERT, but because he did not have the money to have the equipment repaired he had to return it in worse condition than what he had agreed to return it.

He said one cat had a broken case and other parts that were in need of repair, amounting to a repair bill of about \$6,000.00. STEGEMAN said he told GAUBERT he was unable to fulfill his agreement in repairing the equipment as he had promised to do, so he told GAUBERT he would turn over to him the above mentioned airplane, and that GAUBERT might be able to sell it for enough money to take care of the needed repairs to the heavy duty equipment. This was agreeable with

GAUBERT, and it was at this time that GAUBERT was given the Bill of Sale for the plane.

STEGEMAN said he had tried to sell the airplane, but without succes. He added that he had attempted to sell the aircraft at the Troutdale, Oregon, airport.

STEGEMAN said when the airplane was brought to Nelson, British Columbia, he rented it from the GAUBERTs. He said he never knew CHARLES HAMLIN, but he vaguely recalls that it was HAMLIN who flew the plane from Oregon to Nelson; however, he does not recall who arranged for it to be flown to Nelson by HAMLIN, but it is his opinion that WILLIAM GAUBERT did. At that time, to the best of his recollection, GAUBERT was living in Pasco, Washington, and he vaguely recalls phoning GAUBERT from Nelson to Pasco, at which time he asked GAUBERT if he could rent the plane. He said he now believes the plane, at that time, was in Pasco, rather than in Oregon. He added, "At least that's what GAUBERT told me".

STEGEMAN said he wanted to use the plane to go from Spokane, Washington to Billings, Montana, and back to Spokane, but he never did make the trip. He explained the reason for his intended trip was to go to Billings to talk to a man who reportedly owned some mines in Canada, because STEGEMAN was interested in purchasing those mines. After he made arrangements to obtain GAUBERT's plane, STEGEMAN said he learned the man no longer lived in Billings, so he decided not to make the trip.

By this time he said he had the plane in Nelson, having been flown there by HAMLIN, so STEGEMAN flew the plane from Nelson to Felts Field, Spokane, Washington. He does not recall the date, but he said about February 21, 1961, could have been the date of that flight, and he would have to consult the flight plan for the exact date. After flying the plane to Spokane, STEGEMAN said he turned the plane over to a party whom he knew only as "DOC" TESTER who was going to use it. He added that "DOC" TESTER later told him that he had used it, but did not give details what he had used it for, where he had flown in it, or what he had ultimately done with the airplane. He added, "He took off in the plane at Spokane's Felts Field, and that's the last I saw of it". He also said "DOC" TESTER later told him he had left the plane in Spokane, but that STEGEMAN did not go to Spokane to see. He added, "As a matter of fact, I don't believe I told GAUBERT where it was; I just lost interest in everything".

According to STEGEMAN, "DOC" TESTER was also interested in the mines in Canada that were owned by the man who reportedly lived in Billings, Montana, and TESTER was supposed to live in the area of Metaline Falls, Washington. He said he knew no more about the man. STEGEMAN admitted that TED TESTER is married to a sister of Mrs. STEGEMAN, and that they live in Spokane, Washington, but that TED TESTER is not identical with "DOC" TESTER, and to the best of his knowledge there is no relationship between the two men.

STEGEMAN said he did not know the instant airplane had been placed in a hangar in Colville, Washington, and that if it were so placed there, he had nothing to do with having it put there.

STEGEMAN related that at times he was in need of cash while he was on the road contracting business in Oregon, and on some such occasions, he sold some of his equipment. He added that in about February, 1960, he sold three wagon air drills, fully automatic, each being valued at about \$8,000.00, and he sold all three for about \$5,500.00 to GEORGE M. PHILPOT, Portland, Oregon, because he needed the money. He added that was the reason why he made such a cheap sale of equipment to GAUBERT.

Concerning the setting up of a Trust Fund for his daughters, STEGEMAN said he had an attorney by the name of Mr. BOCK or BACK, of Albany, Oregon, set up a Trust Fund for the three youngest daughters for their education. He said he does not recall when it was set up for them, but it seems like it was about the time he and his wife left Oregon.

STEGEMAN explained that about ten (10) years earlier, he had set up a Trust Fund for their eldest daughter, whose name is now LYNN LANGMACK, in the amount of about \$5,000.00 with a Savings and Loan Association in Portland, but after awhile, he became in need of money and borrowed money from that Trust Fund with the intention of repaying it; however, they never did pay it back. Be-

cause they had taken her Trust Fund from LYNN, he said they turned over to her their house in Lebanon, Oregon, along with some other real estate property in Lebanon, but he has since understood that the bankruptcy court took all of that from her.

As to the Trust Funds for the three younger girls, STEGEMAN said he does not recall the amount for each, nor the total amount for all three, but he does recall turning over to Mr. BOOCK some cashier's checks on the bank in Albany, Oregon, the name of the bank he does not now recall. He said this was definitely done before he and his wife received any notice of the bankruptcy proceedings that had been filed against them. He said he does not recall how they first learned of the bankruptcy, but he believes they first learned of it in a letter mailed to them in Nelson from the bankruptcy court. He added that he does not believe his daughters knew of the bankruptcy action until after they moved to Nelson during the winter of 1960-1961, and learned of it at the same time the parents learned.

STEGEMAN said the two (2) cashier's checks, which were turned over to Mr. BOOCK for the purpose of setting up a Trust Fund for the three girls, were dated in about October, 1960, and the two checks were to be split between the three girls who were still in school. He said he believes he sent those two (2) checks during the last of December, 1960, or the first of January, 1961, to Mr. BOOCK, and he is inclined to believe it was in the last part of December, 1960.

According to STEGEMAN, he had plans that he could borrow on the \$26,598.68 that was being placed into the Trust Funds for the three girls, and by borrowing on that, he would never actually have to remove all of it. He said the intended borrowing would be to make payments on debts which he owed. At that time, he said he had good prospects of getting good work on the construction of a natural gas pipeline extending from Canada to California and entering the United States near Creston, British Columbia, Canada. He explained that when he and his wife first came to Canada, he was trying to find work, and he had an excellent prospect of getting employment that would give good pay on that pipeline construction near Creston, British Columbia, but in about the last of January or the first of February, 1961, he received notice of the involuntary bankruptcy that had been filed against him in Oregon. When he received that information, he said he just dropped all efforts to get the pipeline job and returned to his new home in Nelson, where he had been living. He said he had spent November and part of December, 1960, in the Creston area awaiting employment.

STEGEMAN said he never, at any time, had any intentions of concealing funds from his creditors, and "If they had left me alone, I'd have been back in Lebanon about mid-January or the last of January with the money to pay my creditors". He added that he had arranged for financial backing at some "place out of Spokane" in order to enable him to pay off all his creditors, but when the bankruptcy was filed against him, he gave up on that plan. He

refused to give the name of the person or institution or even the name of the town out of Spokane where he had arranged to obtain the financial backing.

He said he does not recall any United States Government check in the approximate amount of \$49,000.00 without reviewing his financial record books for the operation of his construction company. However, he said this money could have been used to obtain cashier's checks for his daughters' Trust Funds.

STEGEMAN said he did not reply to the letters written on or about June 1, 1961, and December 19, 1961, by Mr. PENDERGAST, the attorney for the Trustee in this bankruptcy case, although he acknowledged receiving them because he had lost all interest. He added, "If they'd have left us alone, we'd have paid the money". He said he plans to pay off all the debts he owes some day, but he does not know how he will do it.

The following description was obtained through observation and interview:

Name	FRED HENRY STEGEMAN
Race	White
Sex	Male
Nationality	American, now a landed Canadian Immigrant
Age	49 years
Born	May 16, 1913, at Bickelton, Washington

Height	5' 6½"
Weight	156 lbs.
Hair	Gray, formerly dark brown
Eyes	Brown, wears glasses
Education	High School Graduate
Parents	Deceased
Wife	IONE E. STEGEMAN
Residence	Kline's Trailer Court, Nelson, British Columbia
Employment	Heavy equipment operator and mechanic

DEFENDANTS' REQUESTED INSTRUCTION NO. 15

You are instructed that inasmuch as defendants were resident in Nelson, British Columbia, Canada, outside of the jurisdiction of the Bankruptcy Court at the time of the filing of the Petition for Involuntary Bankruptcy against them, and inasmuch as there was no personal service on either of the defendants, only in rem jurisdiction of the bankrupt estates was acquired by the Court. Therefore defendants had no duty to personally disclose assets or to personally attend Meetings of Creditors; rather, defendants were required only not to conceal assets within the State of Oregon, and even this limited duty did not arise until the defendants acquired actual knowledge of the bankruptcy proceedings. *EDWARDS v. U.S.* (CA 9, Wash. 1959) 265 F2d 302. *RACHMIL v. U.S.* (CA 9, 1930) 43 F2d 878, cert. den. 283 U.S. 819, 51 S. Ct. 344, 75 L. Ed. 1434.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA

v.

CR 64-43

IONE E. STEGEMAN,

defendant.

On this 24th day of May, 1967 came Jack Collins the attorney for the government and the defendant appeared in person and by counsel, Louise Jayne.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of knowingly and fraudulently transferring, concealing and removing from the District of Oregon to Nelson, British Columbia, Canada certain property, with intent to defeat the Bankruptcy laws of the United States and to conceal said property from a Trustee and creditors of the bankrupt estate, in violation of Title 18, United States Code, Section 152 as charged in count I; and knowingly and fraudulently concealing from creditors and Trustee of the bankrupt estate certain property belonging to and owned by said estate, which property defendant well knew was then and there owned by the estate in bankruptcy, in violation of Title 18, United States Code, Section 152, as charged in count II of the Indictment.

as charged

and the court have asked the defendant wheth-

er he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and fined the sum of \$5,000.00 on count I of the Indictment.

Imposition of sentence on count II of the Indictment is hereby suspended and the defendant placed on probation for a period of four (4) years. Such period of probation to follow release from imprisonment imposed on count I and upon the conditions of probation contained in Probation Form No. 7, as adopted by the Order of this Court entered August 4, 1964 and the special condition that the defendant cooperate fully with the Trustee in Bankruptcy and all other bankruptcy officials in an effort to locate all the assets of the bankrupt estate, including cash.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ROBERT C. BELLONI

United States District Judge.



RECEIVED

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 9 1968

WM. B. LUCK, CLERK

JAMES A. and AUDREY J. WARNER,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

JERRIE D. and LETA J. SCHOOLEY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

RICHARD C. PUGH,
Acting Assistant Attorney General.

MEYER ROTHWACKS,
HARRY BAUM,
HOWARD J. FELDMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FILED

FEB 9 1968

WM. B. LUCK, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22174

JAMES A. and AUDREY J. WARNER,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

No. 22174-A

JERRIE D. and LETA J. SCHOOLEY,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISIONS OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 51-60) is reported at 48 T.C.

49.

JURISDICTION

This petition for review (R. 63-66) involves federal income taxes for the calendar year 1963. On August 10, 1965, the Commissioner of

Internal Revenue mailed to taxpayers James A. and Audrey J. Warner a notice of deficiency, asserting deficiencies in income tax in the amount of \$2,312.27 for 1963. (R. 6-8.) On the same date the Commissioner also mailed to taxpayers Jerrie D. and Leta J. Schooley a notice of deficiency, asserting deficiencies in income tax in the amount of \$1,140.46 for 1963. (R. 18-20.) Within ninety days thereafter, or on September 28, 1965, James A. and Audrey J. Warner filed a petition with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 1-8.) Also within ninety days thereafter, or on October 1, 1965, Jerrie D. and Leta J. Schooley filed a petition with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the 1954 Code. (R. 12-20.) The decisions of the Tax Court were entered May 2, 1967. (R. 61, 62.) The cases are brought to this Court by a petition for review filed July 31, 1967 (R. 63-66), within the three-month period prescribed by Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

Whether the record warrants the Tax Court's conclusion that a corporation (Ranchers, Inc.) of which taxpayers were stockholders did not issue its stock in the manner prescribed by Section 1244 of the Internal Revenue Code of 1954, and that therefore taxpayers were not entitled to an ordinary loss deduction under that section for the year 1963.

STATUTE AND REGULATIONS INVOLVED

The statute and Regulations are set forth in the Appendix, infra.

STATEMENT

The facts as stipulated (R. 25-44) and as found by the Tax Court (R. 52-57) may be summarized as follows:

Taxpayers James A. Warner and Audrey J. Warner timely filed a federal joint income tax return for the calendar year 1963 with the District Director of Internal Revenue, Boise, Idaho. (R. 52.)

Taxpayers 1/ Jerrie D. Schooley and Leta J. Schooley timely filed a federal joint income tax return for the calendar year 1963 with the District Director of Internal Revenue, Boise, Idaho. (R. 53.)

Sewmor Sewing Center, Inc. (hereinafter referred to as Sewmor), an Idaho corporation wholly owned by James Warner, is engaged in the sewing machine and vacuum cleaner sales business in Boise, Idaho. Sewmor had an excellent group of steady employees, averaging about ten in number. Sewmor had not advertised for employees for a period of over six years although the industry experienced a substantial turnover in employees. James Warner and Jerrie Schooley were employees of Sewmor. (R. 53.)

Ranchers, Inc. (hereinafter referred to as Ranchers), was a new domestic corporation organized under the laws of the State of Idaho with its principal place of business in Boise, Idaho. Its charter was issued on December 29, 1961. At the first meeting of the board

1/ The term "taxpayers" will collectively refer to James and Audrey Warner and Jerrie and Leta Schooley.

of directors of Ranchers, held on January 5, 1962, James Warner was elected president, Joanne Warner was elected vice president, and Howard M. Deeds was elected secretary-treasurer. (R. 53.)

Ranchers' authorized capital was \$100,000, divided into 10,000 shares of common stock at \$10 per share. There was only one issue of stock, which was common stock. At the time of incorporation there were three qualifying shares of stock issued. (R. 53-54.) Ranchers qualified at that time as a small business corporation as defined by Section 1244(c)(2), 1954 Code, insofar as the provisions of that paragraph defining the size and capitalization of a small business corporation are concerned. (R. 27.)

The purpose of incorporating Ranchers was to create an incentive for the employees to stay with Sewmor, an incentive to work harder, and also to give them a chance to save money and build up some assets for themselves. This objective was to be accomplished by having Sewmor's employees invest seven percent of their salaries and commissions in a fund to be matched by Sewmor. The fund proceeds were to be used to purchase stock in Ranchers. (R. 54.) At Ranchers' first board meeting held on January 5, 1962, the following resolution was unanimously adopted (R. 32, 33, 54):

BE IT RESOLVED that 3,000 shares of stock of Ranchers, Inc., be, and the same is hereby, set aside and allowed for purchase by the trustees of the employees of Sewmor Sewing Center, Inc., pursuant to the trust agreement attached to these minutes, and that the corporation from said 3,000 shares sell stock of the corporation to the trustees at its book value but not less than the par value, to wit, \$10.00 per share; that upon receipt from the trustees of payment for said stock the same shall be issued to the trustees.

The trust agreement between Sewmor and its employees, alluded to in the resolution set out above, provided that if each employee agreed to have seven percent withheld from his gross salary, Sewmor would contribute a like amount to the trust fund for the benefit of that employee. The trustees would use the funds as available to purchase stock in Ranchers. The trustees would subsequently transfer the stock to the employees. The 3,000 shares allotted were available for purchase only by the employees of Sewmor. (R. 54-55.) Section (f) of the trust agreement provided as follows (R. 55):

(f) When said allotted stock of Ranchers, Inc. to the amount of 3,000 shares has been purchased by Trustees or on the ____ day of _____, 196__, whichever occurs earlier, this trust shall be terminated and all unused funds of each Second Party [employees of Sewmor] as shown by the account sheet of said Second Party shall be refunded to the Second Party entitled thereto and upon presentation of the trust and voting trust certificate of said Second Party to the Trustee, the stock represented by said trust and voting trust certificate shall thereupon be issued and delivered to said Second Party. * * *

In addition to the resolution setting aside stock for Sewmor's employees, Ranchers' president, at the board meeting on January 5, 1962, stated that Sewmor wished to purchase additional stock of Ranchers and requested the board to adopt the following resolution (R. 34):

BE IT RESOLVED that Sewmor Sewing Center be permitted to buy _____ shares of stock of Ranchers, Inc., at its book value but not less than its par value, to wit, \$10.00 per share. That upon payment in cash therefor the stock be issued to Sewmor Sewing Center.

The resolution was unanimously adopted. (R. 34.)

At the time of the adoption of the resolutions the directors of Ranchers were considering using the proceeds from the sale of Ranchers

stock to Sewmor's employees to purchase commercial paper, to wit, sewing machine contracts. This plan, however, never materialized. (R. 55.)

At the annual meeting of Ranchers' stockholders on February 15, 1963, it was decided to discontinue the plan to use the trustees and trust certificates. Issuance of the stock would be made directly to each stockholder. It was also resolved to allow the employees of Sewmor to purchase additional stock from the allotted 3,000 shares alluded to above. (R. 55.)

At a meeting of Ranchers' stockholders and directors on February 18, 1963, it was decided to enter into a fire retardant program. They also decided (1) to purchase and did purchase a Northrup P-61 B airplane and (2) to employ Robert E. Savaria as a pilot and issue 100 shares of Ranchers stock to him for his services performed in equipping the aircraft for fire fighting purposes. (R. 55-56.)

During the months of February, March, and April, 1963, James and Audrey Warner subscribed to and paid for 1,541 shares of common stock of Ranchers at a cost of \$15,410. Certificate No. 9, representing such shares, was issued to James Warner on September 30, 1963. The stock was paid for solely in cash. The stock was continuously owned by him until Ranchers was liquidated. (R. 56.)

During the months of February through July, 1963, Jerrie and Leta Schooley subscribed to and paid for 751 shares of Ranchers common stock at a cost of \$7,510. Certificate No. 6, representing such shares, was issued to Jerrie Schooley on September 30, 1963.

The stock was paid for solely in cash and was continuously owned by him until Ranchers was liquidated. (R. 56.)

On August 29, 1963, Ranchers' airplane was wrecked and Robert E. Savaria was killed. No insurance was carried on the plane, and the loss sustained made it impractical to continue on with the business. (R. 57.)

At a corporate meeting held on November 21, 1963, the following resolution was unanimously approved (R. 57):

BE IT RESOLVED, that Ranchers, Inc., abandon its corporate authority and forfeit its charter and dissolve, and that James A. Warner, the President, and Howard M. Deeds, the Secretary, are authorized to immediately pay all debts of the corporation, and that they be authorized and empowered to take any and all action, and to do any and all acts and things which may, in the judgment of the said officers, be necessary or proper to wind up the affairs of said corporation, and to distribute the assets, which consist chiefly of cash and accounts receivable, pro rata according to the respective interests of each shareholder.

In determining their taxable income for the calendar year 1963 on their federal joint income tax return, James and Audrey Warner deducted \$13,161.97, and Jerrie and Leta Schooley deducted \$6,414.52, claiming that the amounts deducted constituted a "small business stock" loss under Section 1244. (R. 57.)

In separate notices of deficiency sent to each set of taxpayers herein, the Commissioner asserted that the losses sustained by taxpayers in 1963 from the liquidation of Ranchers constituted a capital loss which cannot be treated as a loss from the sale or exchange of property other than a capital asset under the provisions of Section 1244 or any other section of the Internal Revenue Code of

1954. (R. 6-8, 18-20, 57.) The Tax Court entered decisions approving the Commissioner's determination. (R. 61-62.) Taxpayers have petitioned for a review of those decisions. (R. 63-66.)

SUMMARY OF ARGUMENT

1. Section 1244 was added to the Internal Revenue Code of 1954 in 1958 to encourage the financing of "small business corporations", by according ordinary (rather than capital) loss treatment to qualifying stock investments in such corporations if the venture turned out to be financially unsuccessful. However, to be entitled to the special benefits of that section, stockholders must strictly comply with the explicit definitional requirements of "section 1244 stock" laid down by Congress, including the requirement in Section 1244 (c)(1)(A) that the corporation must have "adopted a plan * * * to offer such stock for a period (ending not later than two years after the date such plan was adopted) specified in the plan". (Emphasis added.) The Congressional Report explaining the enactment of Section 1244 states that "such plan must be in writing", and implementing Treasury Regulations (Section 1.1244(c)-1(c))--promulgated pursuant to the authority expressly delegated to the Commissioner (Section 1244(e))--also embody this requirement.

The Tax Court concluded that the Ranchers stock here in question was not offered and issued in the manner prescribed by Section 1244 (c)(1)(A), so as to be entitled to treatment as "section 1244 stock". Far from being clearly erroneous, as taxpayers contend, the Tax Court's conclusion is amply supported by the record. The minutes of the two resolutions relating to issuance of the stock, upon which

taxpayers rely as constituting a qualified "plan", did not specify an offering period of two years or less (or, for that matter, any period), as required by Section 1244(c)(1)(A), nor did the trust agreement referred to in the earlier resolution (and rescinded by the later one) specify the requisite period. Neither the external computations offered by taxpayers to indicate a probability that the stock would be issued within two years of adoption of the earlier resolution, nor proof that the stock was in fact issued within two years, suffices to meet the explicit statutory requirement that a period of two years or less must be "specified in the plan". To permit such extrinsic evidence to satisfy the statutory requirement would substitute the court's definition of "section 1244 stock" for the one carefully prescribed by the Congress.

2. In view of its holding that the stock did not meet the offering period requirement of Section 1244(c)(1)(A), the Tax Court deemed it unnecessary to reach and pass upon the Commissioner's alternative contentions that the stock also failed to meet other definitional requirements of Section 1244(c). If this Court agrees that Section 1244(c)(1)(A) was not satisfied, the Tax Court's decision is entitled to affirmance on that ground alone. But even if this Court should disagree, the decision below is nevertheless entitled to affirmance on any of the following alternative grounds:

(a) Neither the minutes nor the trust agreement specified the maximum amount to be received by the corporation for its shares, as required by the statute and the Regulations. This information is

necessary for a determination of whether the corporation qualifies as a "small business corporation". See Section 1244(c)(1)(B) and (2); Regulations Section 1.1244(c)-1(c).

(b) The stock was issued to taxpayers after a simultaneous offering was made to Sewmor (another corporation owned by taxpayers), in contravention of the provision in Section 1244(c) that Section 1244 stock "does not include stock if issued (pursuant to the plan referred to in subparagraph (A)) after a subsequent offering of stock has been made by the corporation". Under the implementing Treasury Regulations (Section 1.1244(c)-1(h)), this provision applies not only to stock issued after a "subsequent" offering, but also to stock issued after a "simultaneous" offering. See also Section 1244(c)(1)(C) and Regulations Section 1.1244(c)-1(h)(1).

(c) Some of the stock was not issued "for money or other property", as required by Section 1244(c)(1)(D), but was issued to one Savaria for services. See also Regulations Section 1.1244(c)-1(f)(1).

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT RANCHERS, INC., DID NOT ISSUE ITS STOCK IN THE MANNER PRESCRIBED BY SECTION 1244 OF THE INTERNAL REVENUE CODE OF 1954 AND THAT AS A RESULT TAXPAYERS, WHO WERE SHAREHOLDERS IN RANCHERS, WERE NOT ENTITLED TO THE ORDINARY LOSS DEDUCTION PERMITTED BY THAT SECTION

A. Introductory

A loss from the sale or worthlessness of stock (a capital asset) is a capital loss, the deductibility of which is limited to capital gains plus \$1,000 of ordinary income. See Sections 165(g), 1211(b), 1221, 1222 of the Internal Revenue Code of 1954. However, Section

1244, Appendix, infra, carves out an exception to this general rule by permitting certain losses from the sale or worthlessness of "section 1244 stock," i.e., stock of a "small business corporation" as defined in subsection (c)(2), to be "treated" as ordinary losses if the stock constitutes "section 1244 stock" as defined in subsection (c)(1).

The question on this appeal is whether taxpayers qualified for "section 1244" losses on their stock in Ranchers, Inc., when that corporation was liquidated and taxpayers received only fractional returns on their initial investments. This in turn depends on whether Ranchers issued such stock in the manner prescribed by the explicit and detailed terms of the statute. The Tax Court, in a well-reasoned opinion, held that the stock was not issued under a plan which limited the duration of the offering to two years or less, as required by Section 1244(c)(1)(A), and, as its ultimate holding, determined that taxpayers were not entitled to the ordinary loss deduction permitted by Section 1244. (R. 59-60.) In addition to this major and fatal flaw in Ranchers' plan, other disqualifying defects in the plan and in the issuance of the stock itself lend added support to the Tax Court's decision. It is submitted, therefore, that on the basis of the record and the clear applicable legal standards, the decision of the Tax Court was correct and should be affirmed.

B. Failure to limit the duration
of the stock offering

Section 1244(c) states the following requirement, among others, for issuance of "section 1244 stock":

(c) Section 1244 Stock Defined.--

(1) In general.--For purposes of this section, the term "section 1244 stock" means common stock in a domestic corporation if--

(A) such corporation adopted a plan after June 30, 1958, to offer such stock for a period (ending not later than two years after the date such plan was adopted) specified in the plan, (Emphasis added.)

* * * * *

Initially, it is questionable whether Section 1244 covers stock offerings which, as here, were not specifically and intentionally geared to meeting the requirements of that statute; it is a special relief provision which on its face places a premium on planning the issuance of stock so as to qualify under sharply-defined statutory terms. See Shapiro v. Commissioner, decided June 16, 1966 (P-H Memo T.C., par. 66,128); Franconi v. Commissioner, decided April 7, 1965 (P-H Memo T.C., par. 65,087); but see Bruce v. United States (S.D. Tex.), decided November 21, 1967 (68-1 U.S.T.C., par. 9112). But even assuming, arguendo, that a plan fulfilling all the requirements of Section 1244 would entitle taxpayers to the special ordinary loss treatment despite the fact that the stock was not originally issued with Section 1244 in mind, the failure to state a termination date of two years or less in the plan forecloses ordinary loss treatment for the stock; the absence of any one of the requirements prescribed by Section 1244(c)(1) disqualifies all of the stock issued under the plan from Section 1244 treatment. 2/ (R. 59.)

2/ Of course, taxpayers have the burden of proving that they come within the terms of Section 1244. Morgan v. Commissioner, 46 T.C. 878; Shapiro v. Commissioner, supra.

Ranchers' plan must be gleaned from two documents: the minutes of Ranchers' board of directors' meeting on January 5, 1962 (R. 32-35), and a trust agreement established between Ranchers and Sewmor pursuant to a resolution passed at that meeting (R. 36-44). In essence, the resolution and resulting trust established a plan whereby 3,000 shares of Ranchers would be purchased by the trust, which would be financed by a seven percent deduction from the salaries of Sewmor's employees with an equal amount contributed by Sewmor. The trustees would subsequently transfer the stock to the employees. 3/ However, at an annual meeting of Ranchers' shareholders on February 15, 1963, it was decided to discontinue the trust plan and issue the stock directly to Sewmor's employees. 4/ (R. 54-55.) The stock was fully subscribed and paid for by July 31, 1963. (R. 29, 56.) The resolution of the board of directors passed at the meeting held on January 5, 1962, states the following (R. 33):

BE IT RESOLVED that 3,000 shares of stock of Ranchers, Inc., be, and the same is hereby, set aside and allowed for purchase by the trustees of the employees of Sewmor Sewing Center, Inc., pursuant to the trust agreement attached to these minutes, and that the corporation from said 3,000 shares sell stock of the corporation to the trustees at its book value but not less than the par value, to wit, \$10.00 per share; that upon receipt from

3/ It is interesting to note that if stock had been issued to the trust under this arrangement, taxpayers would not have qualified for ordinary loss treatment since they would not have continuously held the stock from the date of issuance. See Treasury Regulations, Section 1.1244(a)-1(b), Appendix, infra.

4/ Minutes can qualify as a "plan" under Section 1244(c)(1)(A) if they contain all of the required elements of a plan specified in that section of the Code and its interpretive Regulations. Rev. Rul. 66-67, 1966 Cum. Bull. 191. Although the resolution of February 15, 1963, modified the resolution of January 5, 1962, by rescinding the trust agreement, the taxpayers relied upon the trust provisions in contending that the requirements of Section 1244(c) were met, and the Tax Court likewise considered them for purposes of determining whether the requirements were met.

the trustees of payment for said stock the same shall be issued to the trustees.

The pertinent portion of the trust agreement states that (R. 42):

(f) When said allotted stock of Ranchers, Inc. to the amount of 3,000 shares has been purchased by the Trustees or on the _____ day of _____, 196__, whichever occurs earlier, this trust shall be terminated and all unused funds of each Second Party as shown by the account sheet of said Second Party shall be refunded to the Second Party entitled thereto and upon presentation of the trust and voting trust certificate of said Second Party to the Trustee, the stock represented by said trust and voting trust certificate shall thereupon be issued and delivered to said Second Party.

Clearly, neither of these documents provides for a termination date "ending not later than two years after the date such plan was adopted." Section 1244(c)(1)(A). See also Treasury Regulations, Section 1.1244(c)-1(c), Appendix, infra.

Taxpayers argue (Br. 12, 23-24) that it was not intended that the plan would extend beyond a two-year period 5/ and that oral expressions of this intent made it unnecessary to reduce this portion of the plan to writing. Furthermore, they contend (Br. 25) that neither the statute nor its legislative history expresses the Congressional intent that the offer and the period specified must be in writing. Quite to the contrary, not only does the statute suggest a written plan by requiring a period "specified in the plan" (Section 1244(c)(1)(A)), but the legislative history clearly states that "such plan must be in writing." (H. Rep. No. 2198, 85th Cong.,

5/ Taxpayer James A. Warner testified (R. 70) that the term of the trust was not to be extended over a two-year period. This appears to be incompatible with certain language in the employee's application for participation in the trust which permitted termination on his part only "after twenty-four (24) months by sixty (60) days written notice" (R. 37).

2d Sess., p. 8 (1959-2 Cum. Bull. 709, 714.) 6/ As the Tax Court pointed out (R. 59), Section 1244(a)(1)(A) requires both (1) that the plan must end not later than two years after the date on which the plan was adopted, and (2) that such period of two years or less must be specified in the plan. Although the offering by Ranchers ended within two years, to meet the first requirement 7/ (R. 60), the failure to state the period of the offering in the plan was fatal to its qualification for Section 1244 treatment. Eger v. Commissioner, decided August 30, 1966 (P-H Memo T.C., par. 66,128), pending on appeal (C.A. 2d); Morgan v. Commissioner, 46 T.C. 878; see Lichtenberg v. Commissioner, decided June 14, 1967 (P-H Memo T.C., par. 67,130); Spillers v. Commissioner, decided October 31, 1967 (P-H Memo T.C., par. 67,216); Bruce v. United States, supra. This requirement had to be met at the time the stock was offered. 8/ Spillers v. Commissioner, supra. The failure to establish the period for the stock offering in the plan is enough to deny taxpayers Section 1244 treatment. However, there are other flaws which also preclude taxpayers from obtaining ordinary loss treatment.

6/ Thus, Treasury Regulations, Section 1.1244(c)(1)(C), requiring that a plan be in writing, which taxpayers attack (Br. 26) as unreasonable, are consistent with legislative intent.

7/ Taxpayers' Specification of Error No. 6 (Br. 17) that the Tax Court erred in failing to hold that the offer was completed in less than two years overlooks a Tax Court observation to the contrary (R. 60). Specifications of Error Nos. 3, 4 and 5 (Br. 17; 30-31) deal with findings the Tax Court need not have made since the failure to state a two-year period in the plan alone is enough to disqualify stock from Section 1244 treatment.

8/ Computations presented by taxpayers (Br. 12-13; 23) to show that the seven percent deductions from the employees' salaries and matching company contributions would result in the purchase of all stock within

C. Failure to state the amount of the offering

Neither the minutes of the board of directors' meeting (R. 32-35) nor the trust agreement (R. 36-43) reflects the maximum amount to be received by the corporation for its shares, as required by the Regulations. Treasury Regulations Section 1.1244(c)-1(c), issued pursuant to a specific grant of authority delegated to the Commissioner (Section 1244(e)), requires that "The plan must specifically state, in terms of dollars, the maximum amount to be received by the corporation in consideration for the stock to be issued pursuant thereto." See also Section 1244 (c)(1)(B) and (2); H. Rep. No. 2198, 85th Cong., 2d Sess., p. 8 (1959-2 Cum. Bull. 709, 714). The resolution only states that the shares would be sold at "book value but not less than the par value, to wit, \$10.00 per share." (R. 33.) There is thus no upper limit on the price to be paid for the shares and no maximum amount to be received by the corporation for their issuance, rendering the plan deficient on this count. See Eger v. Commissioner, supra; Spillers v. Commissioner, supra.

Strict compliance with the statutory definitions of "section 1244 stock" and "small business corporation" is essential to the operation of Section 1244. Given the Congressional objectives that no more than a specified amount may be invested to qualify for ordinary loss treatment, that the stock offering must be pursuant to a plan adopted after June 30, 1958, with a duration of not more than two years, and that the transaction must be an infusion of new capital and

8/ (continued) about two years falls far short of the statutory requirement that the period be specified in the plan. Moreover, such estimates were based on past payrolls and payrolls could vary (including downward) in future years.

not a rearranging of old capital (Section 1244(c)(1) and (2)), one can readily see that there may be difficulty in separating shares which qualify from those which do not. A written and specific plan -- with its duration and aggregate amount spelled out -- satisfies the necessary identification requirements. 9/ Since these two requirements must be determined at the time the plan is adopted and the actual loss under the statute could occur many years later, only a written plan will preserve the record of compliance. 10/

D. Subsequent stock offering

Even if a corporation adopts a plan which qualifies under the statute, simultaneous or subsequent events may preclude the shares issued under the plan from receiving Section 1244 treatment. Therefore, assuming, arguendo, that Ranchers adopted a plan which fulfilled all of the requirements of Section 1244(c)(1)(A), a contemporaneous stock offering to Sewmor (R. 34), and a subsequent issue of stock to Robert Savaria for services (R. 55-56) before the shares in question were issued to taxpayers, disqualified their shares from Section 1244 treatment.

9/ The Tax Court has even held that minutes which specifically provided that common stock was to be issued "pursuant to the terms and provisions of Section 1244" did not qualify as a plan under Section 1244 because the critical element of the plan's duration was not revealed. Eger v. Commissioner, supra. Contrast this with the present situation where the plan's duration was also not included, there was no reference to Section 1244, and there seems to have been no intention to qualify under that section.

10/ For the same reason, the Regulations required that the issuing corporation must maintain records showing all stock issued pursuant to the plan. Treasury Regulations Section 1.1244(e)-1(a)(1) and (3), Appendix, infra; see also Morgan v. Commissioner, supra. Taxpayers did not introduce records into evidence which satisfied these requirements.

The minutes of the January 5, 1962, meeting of Ranchers' board of directors contain not only the resolution to establish the trust for Sewmor's employees (R. 33), but also include a resolution which permits Sewmor to buy an unspecified amount of shares at book value but not below par, i.e., \$10 (R. 34). Section 1244(c) states that "section 1244 stock" does not include stock if issued under an otherwise qualifying plan after a subsequent offering of stock has been made by the corporation. Treasury Regulations Section 1.1244(c)-1(h), Appendix, infra, states that even though the plan satisfies the requirements of Section 1244(c)(1), if another offering of stock is made by the corporation subsequent to or simultaneous with the adoption of the plan, stock issued pursuant to the plan after such offering shall not qualify as Section 1244 stock. See also H. Rep. No. 2198, 85th Cong., 2d Sess., p. 8 (1959-2 Cum. Bull. 709, 715). The offering under the plan and the offering to Sewmor were simultaneously made on January 5, 1962. 11/ (R. 32-35.) Taxpayers subscribed to and paid for their shares during the months of February through July, 1963. (R. 56.) The stock was fully subscribed by July 31, 1963. (R. 29.) Since the stock was issued to taxpayers after the offer to Sewmor, it was foreclosed from Section 1244 treatment.

11/ This is based on the assumption that the January 5, 1962, minutes and trust referred to therein, would be the controlling documents in determining whether a plan existed in this case. See fn. 4, supra. If the plan must be derived from the minutes of the meeting of February 15, 1963, then the stock offering to Sewmor is a prior offering which also eliminates the stock from Section 1244 treatment. Section 1244(c)(1)(C).

E. Issuance of stock for services

Section 1244(c)(1)(D) also requires, as a condition to qualifying as "Section 1244 stock", that the stock be issued "for money or other property." Stock issued for services rendered or to be rendered to the issuing corporation does not qualify as Section 1244 stock. Treasury Regulations Section 1.1244(c)-1(f)(1), Appendix, infra. See also H. Rep. No. 2198, 85th Cong., 2d Sess., p. 8 (1959-2 Cum. Bull. 709, 715). At a meeting on February 18, 1963, the board of directors of Ranchers decided to issue 100 shares of stock to Robert E. Savaria for his services performed in equipping the aircraft to be used in the corporation's fire retardant program. (R. 55-56.) The apparent issuance of this stock 12/ before the taxpayers fully subscribed for their stock (R. 29, 56) and, moreover in consideration for services rather than for "money or other property," disqualifies the taxpayer's stock from Section 1244 treatment on both counts.

In the final analysis, taxpayers' contention that stock received from Ranchers qualified as "section 1244 stock" disregards the explicit provisions of Section 1244 and the implementing Regulations and, if sustained, would render nugatory the express limitations upon the relief Congress intended to allow that section. 13/ Since Section 1244

12/ The stock is deemed issued when paid for, not when the certificates are delivered. Morgan v. Commissioner, supra; Lichtenberg v. Commissioner, supra. Since the stock here was being issued for services previously rendered, the date of issuance would be the date of the board resolution.

13/ It is elementary that exemption or remedial statutes are matters of legislative grace and must be strictly construed against the taxpayer. United States v. Stewart, 311 U.S. 60, 71; Cornell v. Coyne, 192 U.S. 418, 431-432; Better Business Bureau v. United States, 326 U.S. 279, 283; Helvering v. Ohio Leather Co., 317 U.S. 102, 106. "Nor can the doctrine that remedial legislation is entitled to liberal

is a tax relief measure, it cannot work against taxpayers; while compliance with its terms will afford the special relief, failure to meet them cannot lead the taxpayer to any unfortunate tax results. The track has been carefully laid by Congress and must be followed without deviation. There can be little doubt that Congress, by enacting such specific requirements, intended to place a premium on advance planning. As the Tax Court stated in Morgan v. Commissioner, supra, p. 889:

Had the incorporators of and investors in Junction had good and timely legal advice, this confusion would probably have been avoided, but section 1244 being designed to provide a tax benefit to a rather limited group of taxpayers as it is, we feel that qualification for those benefits requires strict compliance with the requirements of the law and the regulations promulgated pursuant to the specific instructions therefor included in section 1244(e).

Neither the plan for the issuance of Ranchers' stock nor the stock issuance itself met the conditions of the statute and its implementing Regulations.

13/ (continued) construction, upon which the taxpayers also rely, be stretched to expand the reach of the statute of such evident limited purpose as this one." United States v. Zacks, 375 U.S. 59, 68. As the Second Circuit observed (per Learned Hand) in Smart v. Commissioner, 152 F. 2d 333, 335, certiorari denied, 327 U.S. 804, in dealing with a tax relief statute containing, as does Section 1244, specific conditions precedent to its applicability--

On the other hand, the section is an exemption and as such must submit to close scrutiny; and -- what is more important -- Congress has been sparing in the relief given. * * *

From all this it appears that we have to deal with a statute which not only has been amended, but amended with a precision which, it seems to us, should forbid any assumption that it is infused with a broad purpose, which we should ramify as the occasion may demand.

CONCLUSION

For the reasons stated above, the decisions of the Tax Court should be affirmed.

Respectfully submitted,

RICHARD C. PUGH,
Acting Assistant Attorney General.

MEYER ROTHWACKS,
HARRY BAUM,
HOWARD J. FELDMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FEBRUARY, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1968.

Howard J. Feldman, Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 1244 [as added by Sec. 202(b), Small Business Tax Revision Act of 1958, P.L. 85-866, 72 Stat. 1606, 1676]. LOSSES ON SMALL BUSINESS STOCK.

(a) General Rule.--In the case of an individual, a loss on section 1244 stock issued to such individual or to a partnership which would (but for this section) be treated as a loss from the sale or exchange of a capital asset shall, to the extent provided in this section, be treated as a loss from the sale or exchange of an asset which is not a capital asset.

(b) Maximum Amount for Any Taxable Year.--For any taxable year the aggregate amount treated by the taxpayer by reason of this section as a loss from the sale or exchange of an asset which is not a capital asset shall not exceed--

(1) \$25,000, or

(2) \$50,000, in the case of a husband and wife filing a joint return for such year under section 6013.

(c) Section 1244 Stock Defined.--

(1) In general.--For purposes of this section, the term "section 1244 stock" means common stock in a domestic corporation if--

(A) such corporation adopted a plan after June 30, 1958, to offer such stock for a period (ending not later than two years after the date such plan was adopted) specified in the plan,

(B) at the time such plan was adopted, such corporation was a small business corporation,

(C) at the time such plan was adopted, no portion of a prior offering was outstanding,

(D) such stock was issued by such corporation, pursuant to such plan, for money or other property (other than stock and securities), and

(E) such corporation, during the period of its 5 most recent taxable years ending before the

date the loss on such stock is sustained (or if such corporation has not been in existence for 5 taxable years ending before such date, during the period of its taxable years ending before such date, or if such corporation has not been in existence for one taxable year ending before such date, during the period such corporation has been in existence before such date), derived more than 50 percent of its aggregate gross receipts from sources other than royalties, rents, dividends, interest, annuities, and sales or exchanges of stock or securities (gross receipts from such sales or exchanges being taken into account for purposes of this subparagraph only to the extent of gains therefrom); except that this subparagraph shall not apply with respect to any corporation if, for the period referred to, the amount of the deductions allowed by this chapter (other than by sections 172, 242, 243, 244, and 245) exceed the amount of gross income.

Such term does not include stock if issued (pursuant to the plan referred to in subparagraph (A)) after a subsequent offering of stock has been made by the corporation.

(2) Small business corporation defined.--For purposes of this section, a corporation shall be treated as a small business corporation if at the time of the adoption of the plan--

(A) the sum of--

(i) the aggregate amount which may be offered under the plan, plus

(ii) the aggregate amount of money and other property (taken into account in an amount, as of the time received by the corporation, equal to the adjusted basis to the corporation of such property for determining gain, reduced by any liabilities to which the property was subject or which were assumed by the corporation at such time) received by the corporation after June 30, 1958, for stock, as a contribution to capital, and as paid-in surplus,

does not exceed \$500,000; and

(B) the sum of--

(i) the aggregate amount which may be offered under the plan, plus

(ii) the equity capital of the corporation (determined on the date of the adoption of the plan),

does not exceed \$1,000,000.

For purposes of subparagraph (B), the equity capital of a corporation is the sum of its money and other property (in an amount equal to the adjusted basis of such property for determining gain), less the amount of its indebtedness (other than indebtedness to shareholders).

(d) Special Rules.--

(1) Limitations on amount of ordinary loss.--

(A) Contributions of property having basis in excess of value.--If--

(i) section 1244 stock was issued in exchange for property,

(ii) the basis of such stock in the hands of the taxpayer is determined by reference to the basis in his hands of such property, and

(iii) the adjusted basis (for determining loss) of such property immediately before the exchange exceeded its fair market value at such time,

then in computing the amount of the loss on such stock for purposes of this section the basis of such stock shall be reduced by an amount equal to the excess described in clause (iii).

(B) Increases in basis.--In computing the amount of the loss on stock for purposes of this section, any increase in the basis of such stock (through contributions to the capital of the corporation, or otherwise) shall be treated as allocable to stock which is not section 1244 stock.

(2) Recapitalizations, changes in name, etc.--
To the extent provided in regulations prescribed by the Secretary or his delegate, common stock in a corporation, the basis of which (in the hands of a taxpayer) is determined in whole or in part by reference to the basis in his hands of stock in such corporation which meets the requirements of subsection (c)(1) (other than subparagraph (E) thereof), or which is received in a reorganization described in section 368(a)(1)(F) in exchange for stock which meets such requirements, shall be treated as meeting such requirements. For purposes of paragraphs (1)(E) and (2)(A) of subsection (c), a successor corporation in a reorganization described in section 368(a)(1)(F) shall be treated as the same corporation as its predecessor.

(3) Relationship to net operating loss deduction.--
For purposes of section 172 (relating to the net operating loss deduction), any amount of loss treated by reason of this section as a loss from the sale or exchange of an asset which is not a capital asset shall be treated as attributable to a trade or business of the taxpayer.

(4) Individual defined.--For purposes of this section, the term "individual" does not include a trust or estate.

(e) Regulations.--The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this section.

(26 U.S.C. 1964 ed., Sec. 1244.)

Treasury Regulations on Income Tax (1954 Code):

§1.1244(a)-1 Loss on small business stock treated as ordinary loss.

(a) In general. Subject to certain conditions and limitations, section 1244 provides that a loss on the sale or exchange (including a transaction treated as a sale or exchange, such as worthlessness) of "section 1244 stock" which would otherwise be treated as a loss from the sale or exchange of a capital asset shall be treated as a loss from the sale or exchange of an asset which is not a capital asset (referred to in this section and §§1.1244(b)-1 to 1.1244(e)-1, inclusive, as an "ordinary loss"). Such a loss shall be allowed as a deduction from gross income in arriving at adjusted gross

income. The requirements that must be satisfied in order that stock may be considered section 1244 stock are described in §§1.1244(c)-1 and 1.1244(c)-2. These requirements relate to the stock itself and the corporation issuing such stock. In addition, the taxpayer who claims an ordinary loss deduction pursuant to section 1244 must satisfy the requirements of paragraph (b) of this section.

(b) Taxpayers entitled to ordinary loss. The allowance of an ordinary loss deduction for a loss on section 1244 stock is permitted only to the following two classes of taxpayers:

(1) An individual sustaining the loss to whom such stock was issued by a small business corporation, or

(2) An individual who is a partner in a partnership at the time the partnership acquired such stock in an issuance from a small business corporation and whose distributive share of partnership items reflects the loss sustained by the partnership.

In order to claim a deduction under section 1244 the individual, or the partnership, sustaining the loss, must have continuously held the stock from the date of issuance. A corporation, trust, or estate is not entitled to ordinary loss treatment under section 1244 regardless of how the stock was acquired. An individual who acquires stock from a shareholder by purchase, gift, devise, or in any other manner is not entitled to an ordinary loss under section 1244 with respect to such stock. Thus, ordinary loss treatment is not available to a partner to whom the stock is distributed by the partnership. Stock acquired through an investment banking firm, or other person, participating in the sale of an issue may qualify for ordinary loss treatment only if the stock is not first issued to such firm or person. Thus, for example, if the firm acts as a selling agent for the issuing corporation the stock may qualify. On the other hand, stock purchased by an investment firm and subsequently resold does not qualify as section 1244 stock in the hands of the person acquiring the stock from the firm.

* * * * *

(26 C.F.R., Sec. 1.1244(a)-1.)

§1.1244(c)-1 Section 1244 stock defined.

(a) In general. In order that stock may qualify as section 1244 stock the requirements described in paragraphs (b) through (h) of this section must be satisfied. Except for the requirement in paragraph (g) of this section, the

determination as to whether such requirements are met may be made at or before the time the stock is issued. The determination as to whether the requirement set forth in paragraph (g) of this section, relating to gross receipts of the corporation, has been satisfied may be made only at the time a loss is sustained on the stock. Therefore, at the time of issuance it cannot be said with certainty that the stock would qualify for the benefits of section 1244.

(b) Common stock. Only common stock, either voting or nonvoting, in a domestic corporation may qualify as section 1244 stock. For purposes of section 1244, neither securities of the corporation convertible into common stock nor common stock convertible into other securities of the corporation shall be treated as common stock. For definition of domestic corporation see section 7701(a)(4) and the regulations thereunder.

(c) Written plan. (1) The common stock must be issued pursuant to a written plan adopted by the corporation after June 30, 1958, to offer only such stock during a period specified in the plan ending not later than two years after the date the plan is adopted. The two-year requirement referred to in the preceding sentence will be met if the period specified in the plan is based upon the date when, under the rules or regulations of a Government agency relating to the issuance of the stock, the stock may lawfully be sold, and it is clear that such period will end, and in fact it does end, within two years after the plan is adopted. The plan must specifically state, in terms of dollars, the maximum amount to be received by the corporation in consideration for the stock to be issued pursuant thereto. See §1.1244(c)-2 for the limitation on the amount that may be received by the corporation under the plan. For purposes of section 1244, an increase in the basis of outstanding stock as a result of a contribution to capital is not an issuance of stock.

(2) To qualify, the stock must be issued during the period of the offer, which period must end not later than two years after the date the plan is adopted. Stock which is subscribed for during the period of the plan but not issued during such period cannot qualify as section 1244 stock. Stock issued on the exercise of a stock right, stock warrant, or stock option (which right, warrant, or option was not outstanding at the time the plan was adopted) will be treated as issued pursuant to a plan only if the right, warrant, or option is applicable solely to unissued stock offered under the plan and is exercised during the period of the plan.

(3) Stock subscribed for prior to the adoption of the plan, including stock subscribed for prior to the date the corporation comes into existence, may be considered issued pursuant to a plan adopted by the corporation if the stock is not in fact issued prior to the adoption of such plan.

(4) Stock issued for a payment which, alone or together with prior payments, exceeds the maximum amount that may be received under the plan, is not considered issued pursuant to the plan, and none of such stock can qualify as section 1244 stock. See example (2) in §1.1244(c)-2(d).

* * * * *

(e) Prior offering. Stock will not qualify as section 1244 stock if at the time of the adoption of the plan under which it is issued there remains unissued any portion of a prior offering of stock. Thus, if any portion of an outstanding offering of common or preferred stock is unissued at the time of the adoption of the plan, stock issued under the plan will not qualify as section 1244 stock. An offer is outstanding unless and until it is withdrawn by affirmative action prior to the time the plan is adopted. Stock rights, stock warrants, stock options, or securities convertible into stock, which are outstanding at the time the plan is adopted, are deemed to be prior offerings. The authorization in the corporate charter to issue stock different from stock offered under the plan or in excess of stock offered under the plan is not of itself a prior offering.

(f) Issued for money or other property. (1) The stock must be issued to the taxpayer for money or other property transferred by the taxpayer to the corporation. However, stock issued in exchange for stock or securities, including stock or securities of the issuing corporation, cannot qualify as section 1244 stock, except as provided in §1.1244(d)-3, relating to certain cases where stock is issued in exchange for section 1244 stock. Stock issued for services rendered or to be rendered to, or for the benefit of, the issuing corporation does not qualify as section 1244 stock. Stock issued in consideration for cancellation of indebtedness of the corporation shall be considered issued in exchange for money or other property unless such indebtedness is evidenced by a security, or arises out of the performance of personal services.

* * * * *

(h) Subsequent offering. (1) Even though the plan satisfies the requirements of paragraph (c) of this section, if another offering of stock is made by the corporation subsequent to, or simultaneous with, the adoption of the plan, stock issued pursuant to the plan after such other offering shall not qualify as section 1244 stock. The issuance of stock options, stock rights, or stock warrants, at any time during the period of the plan, which are exercisable with respect to stock other than stock offered under the plan, shall be considered a subsequent offering. Likewise, the issuance of stock other than that offered under the plan shall be considered a subsequent offering. Since stock issued upon exercise of a conversion privilege is stock issued for a security, and stock issued pursuant to a stock option granted in whole or in part for services is not issued for money or other property, the issuance of securities with a conversion privilege and the issuance of such a stock option are subsequent offerings, because the conversion privilege and the stock option are exercisable with respect to stock other than that which may properly be offered under the plan. Stock issued under the plan before a subsequent offering is not disqualified by reason of such subsequent offering. The rule of this paragraph, together with the rule of paragraph (e) of this section, relating to offers prior to the adoption of the plan, limits section 1244 stock to stock issued by the corporation during a period when any stock issued by it must have been issued pursuant to the plan.

(2) Any modification of a plan that changes the offering to include preferred stock, or that increases the amount of stock that may be issued thereunder to such an extent that the requirements of section 1244(c)(1)(B) would not have been satisfied if determined with reference to such amount as of the date such plan was initially adopted, or that extends the period of time during which stock may be issued thereunder to more than two years from the date such plan was initially adopted, shall be considered a subsequent offering, and no stock issued thereafter may qualify. However, a corporation may withdraw a plan and adopt a new plan to issue stock. To determine whether stock issued pursuant to such new plan may qualify, section 1244(c) must be applied with respect to the new plan as of the date of its adoption. For example, amounts received for stock under the prior plan must be taken into account in determining whether the requirements of section 1244(c)(2), relating to definition of small

business corporation, are satisfied. In applying the requirements of section 1244(c)(2)(B), reference should be made to equity capital as of the date the new plan is adopted. The same principles apply if the period of the initial plan expires and the corporation adopts a new plan.

(26 C.F.R., Sec. 1.1244(c)-1.)

§1.1244(c)-2 Small business corporation defined.

* * * * *

(b) Amount received by corporation for stock. (1) At the time of the adoption of the plan the sum of the aggregate dollar amount to be paid for stock which may be offered under the plan plus the aggregate amount of money and other property which has been received by the corporation after June 30, 1958, for its stock, as a contribution to capital by its shareholders, and as paid-in surplus must not exceed \$500,000. In making these determinations (i) property is taken into account at its adjusted basis to the corporation (for determining gain) as of the date received by the corporation, and (ii) such aggregate amount is reduced by the amount of any liability to which the property was subject and by the amount of any liabilities which were assumed by the corporation at such time.

(2) For purposes of the \$500,000 test referred to in subparagraph (1) of this paragraph, the total amount of money and other property received for stock, as a contribution to capital, and as paid-in surplus shall not be reduced by distributions to shareholders, even though such distributions are capital distributions. Thus, once the total of such amount received after June 30, 1958, reaches \$500,000, the corporation is precluded from subsequently adopting a plan under which section 1244 stock may be issued.

* * * * *

(26 C.F.R., Sec. 1.1244(c)-2.)

§1.1244(e)-1 Records to be kept and information to be filed with the return.

(a) By the corporation. The plan to issue stock which qualifies under section 1244 must appear upon the records of the corporation. In addition, in order to substantiate an ordinary loss deduction claimed by its shareholders, the corporation should maintain records showing the following:

(1) The persons to whom stock was issued pursuant to the plan, the date of issuance to each, and a description of the amount and type of consideration received from each;

(2) If the consideration received is property, the basis in the hands of the shareholder and the fair market value of such property when received by the corporation;

(3) Which certificates represent stock issued pursuant to the plan;

(4) The amount of money and the basis in the hands of the corporation of other property received after June 30, 1958, and before the adoption of the plan for its stock, as a contribution to capital, and as paid-in surplus;

(5) The equity capital of the corporation on the date of adoption of the plan; and

(6) Information relating to any tax-free stock dividend made with respect to stock issued pursuant to the plan and any reorganization in which stock is transferred by the corporation in exchange for stock issued pursuant to the plan.

* * * * *

(26 C.F.R., Sec. 1.1244(e)-1.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES L. ASSELTINE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U.S. Attorney
Chief, Criminal Division

HENRY J. NOVAK, JR.
Assistant U.S. Attorney

1200 U. S. Court House
312 North Spring Street
Los Angeles, California 90012
Telephone: 688-2417

Attorneys for Appellee,
United States of America

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES L. ASSELTYN,

Appellant

v.

UNITED STATES OF AMERICA

Appellee

APPELLEE'S BRIEF

I

STATEMENT OF THE CASE AND JURISDICTION

This is an appeal of a judgment of conviction entered by the United States District Court for the Central District of California, sitting without a jury, on a one-count indictment charging a violation of 18 U.S.C. §2113(a), ^{1/} — bank robbery.

Jurisdiction to review the judgment of conviction below is conferred upon this Court by the terms of 28 U.S.C. §§ 1291, 1294.

^{1/} "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control management, or possession of, any bank, or any savings and loan association; . . . "

II

STATEMENT OF FACTS

For the most part, the Government has no quarrel with the appellant's recitation of facts. However, because the sole contention on this appeal is that the Government failed to bring forth evidence sufficient to establish that Mr. Asseltyn possessed the "specific intent" to violate §2113(a), we offer a more arrant rendition of the evidence.

The date was February 20, 1967. The scene was the Security First National Bank in Burbank, California. At approximately 12:15 p.m. bank teller Carol Glazer was going about her work [R. T. 17-19], when the appellant entered the bank wearing a pair of sunglasses and carrying a black briefcase. He looked across a counter directly at Timothy Herles, the bank loan officer [R. T. 35]. Appellant wrote something on a piece of paper at the counter and then began to walk from one teller to another, progressing closer to the bank entrance with each move [R. T. 36]. Appellant terminated his movement at Mrs. Glazer's counter and handed her a piece of paper on which was written:

"HOLD UP! DONT RING ALARM! GIVE
ME ALL 100, 50, 20, 10 5'S. GUN UNDER COUNTER.
YOU HAVE 45 SECOND THEN I SHOOT."

Mrs. Glazer removed the money from her cash drawer and placed it on the counter [R. T. 18-20]. Appellant took the note and the money and fled out the front door of the bank, carrying his black

briefcase [R. T. 20]. Mrs. Glazer pressed the alarm button and exclaimed to the customer next in line, Robert Lewis, that she had been robbed [R. T. 22]. Mr. Lewis ran out the front door of the bank to find a friend of his, Burbank motorcycle policeman Hank Figette, sitting on his motorcycle. "Hey, Hank, the bank has been robbed," cried Lewis, and after receiving a description of the appellant from Lewis, Officer Figette was off on his motorcycle [R. T. 29] in the direction the appellant had gone.

Moments later Mr. Herles, the loan officer, came running out of the bank, looked down the street and saw the appellant coming out of a jewelry store, but without his sunglasses or briefcase [R. T. 38]. At Herles' cry of "Stop, robber, help!," appellant began running away down the street [R. T. 38]. Herles began the chase and was joined by Mr. Lewis. Appellant darted into a store, and, unable to ascertain which one, Herles began making brief inquiries of the successive store proprietors. An optician related that a man had entered his store moments before and Herles and Lewis proceeded into that establishment and to the rear entrance where they encountered Officer Figette, who informed them that appellant was in the optical shop [R. T. 39-41]. Officer Figette went into the store, found appellant in the men's room, and placed him under arrest [R. T. 66-67].

The black briefcase containing the robbery note, a toy gun and seven hundred ninety-five dollars (795) was found in the alley near the bank [R. T. 76-84].

GOVERNMENT'S COUNTER ARGUMENT
NUMBER ONE: THE EVIDENCE WAS
SUFFICIENT TO ESTABLISH SPECIFIC
INTENT.

STATEMENT

At the trial, appellant raised the issue of insanity. The fact question raised thereby was decided against appellant.

ARGUMENT

Implicit in the District Court's finding of guilt beyond a reasonable doubt is the resolution that specific intent was established by that same standard. The evidence is most sufficient to warrant the judgment of the court.

The issue of specific intent was raised by appellant in his closing argument to the Court, to which the judge replied:

"The question, if there is a question in this case, is the question as to whether or not the defendant had the capability of forming the specific intent to commit the act which he committed, that is, robbing the bank . . . In all of these cases, if of course, when we are talking about specific intent, the thing that demonstrates the intent more clearly than anything else is just exactly what happened and what took place. The premeditation of this bank robbery leads the

court to the unequivocal opinion that he did have the specific intent to commit the act with which he is charged.

"There is no question that the various emotional factors influenced the defendant to go ahead and do it. But whatever motivated him to go ahead and commit the bank robbery, it was done coldly, it was done specifically, it was done in a manner which was planned and well calculated.

"Therefore I have the implicit duty of finding the defendant guilty of the crime as stated in the indictment . . . The government has proved its case beyond any shadow of a doubt." [R. T. 202-203]

We believe no more elaborate statement of the law could be herein expressed in support of the court's judgment.

Although the appellant made no motion for judgment of acquittal, we feel that in the interests of justice this question should be entertained by this Court. E. g., Clark v. United States, 293 F.2d 445 (5th Cir. 1961).

Likewise, although the psychiatric report on which appellant places principle reliance in his brief was not admitted in evidence, we voice no objection to its employment by appellant in support of his position on appeal.

CONCLUSION

For the foregoing reasons the conviction should be affirmed.

Respectfully submitted

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

HENRY J. NOVAK, JR.
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America

NO. 22179 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE LOUIS JONES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney

MOBLEY M. MILAM
Assistant U.S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee
United States of America.

FILED

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San Diego, California 92101

Attorneys for Appellee
United States of America.

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NO. 22179

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APPELLEE'S BRIEF

I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in Counts One and Two of a three-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Sections 174 and 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II.

STATEMENT OF THE CASE

Appellant was charged in all three counts of a Three-Count indictment. The first count alleged that appellant and a co-defendant, Joseph Raymond Scott, knowingly imported and brought approximately three ounces of heroin into the United States from Mexico.

The second count alleged that appellant and said co-defendant, with intent to defraud the United States, knowingly concealed, and facilitated the transportation and concealment of approximately two pounds of marijuana, knowing it had been imported and brought into the United States contrary to law.

The third count alleged that appellant and said co-defendant, with intent to defraud the United States, knowingly and wilfully smuggled and clandestinely introduced into the United States from Mexico approximately forty-six dexedrine tablets.

A severance of the defendant's trials was granted and jury trial of the appellant commenced on March 23, 1967, before United States District Judge William P. Copple [R.T. 1-3].^{1/} Appellant was found guilty by the jury as charged in Counts One and Two on March 27, 1967, and not guilty

1/

"R.T." refers to the Reporter's Transcript of Proceedings.

as to Count Three. Thereafter, on April 24, 1967, appellant was committed to the custody of the Attorney General for concurrent five year sentences on each count.

III.

ERROR SPECIFIED

Appellant specified the following points upon appeal:

"1. The arrest of the appellant was an illegal arrest and in violation of appellant's constitutional rights.

"2. The search of appellant was in violation of appellant's constitutional rights in that the search was the result of an unlawful and illegal arrest.

"3. The court erred in refusing to allow appellant to show that the person indicted with him had admitted to the United States Commissioner that he was the sole possessor of the drugs in question.

"4. There was a material variance between Counts I and II of the indictment and the proof.

"5. In any event, the provisions of Title 21 U. S. C., Sections 174 and 176-a which deem possession sufficient for conviction unless the defendant explains the same to the satisfaction of the jury are unconstitutional."

(Appellant's Opening Brief, p. 10).

IV.

STATEMENT OF THE FACTS

On December 30, 1966, appellant drove a black Buick, accompanied by another gentleman seated beside him, into the United States from Mexico [R.T. 11]. Both appellant and the passenger stated to the primary Immigrant Inspector, Samuel T. May, that they were United States citizens and that they were bringing nothing from Mexico [R.T. 12]. Appellant was asked to open the trunk, and as he got out and did so, he appeared to be under the influence of alcohol or something [R.T. 12]. Numerous clothing and things were in the car so Mr. May referred appellant to the secondary inspection area for further inspection [R.T. 12]. The name of the passenger was Scott [R.T. 13]. When appellant went to the trunk, Mr. May detected the odor of alcohol, but did not check the passenger [R.T. 14]. Mr. May thought appellant had a jacket or coat on, but couldn't say for certain [R.T. 14]. Scott remained in the car [R.T. 14]. The car was not referred to the secondary inspection area because of a so-called lookout [R.T. 14].

Warren D. Russell, a Customs Inspector, met the appellant and passenger Scott at the secondary inspection area [R.T. 25-27]. Mr. Scott was searched and one brick of marihuana, 46 Dexamil tablets, and one rubber contraceptive of heroin were found on him [R.T. 27], the marihuana in the back of Scott's shirt [R.T. 28], the tablets in the right hand pocket of his topcoat [R.T. 29], and the heroin in his left front pants pocket [R.T. 38]. Appellant was searched, and he pulled two rubber

contraceptives of heroin from his jockey shorts [R.T. 29]. The appellant and Scott were searched individually and separately [R.T. 30], but the marihuana and pills were found on Scott during the preliminary search in the secondary office while appellant was present [R.T. 34-35]. Appellant stipulated as to the chain of custody of the contraband [R.T. 31-32]. Zigzag cigarette papers were found in a metal suitcase in the trunk of the vehicle [R.T. 36]. They are used to smoke marihuana [R.T. 37]. While Scott was searched, appellant was seated in the secondary office; Customs Inspector Young was with him at that time [R.T. 37-38]. While seated in the secondary office, appellant seemed quite nervous and upset and edgy; he squirmed in his chair quite a bit, moved his hands and aroused the suspicion of Mr. Young when he (the appellant) seemed to move his right hand around under his coat or sweater. Mr. Young moved aside the coat or sweater and appellant's zipper fly was open in his trousers. During this period appellant asked to get a drink of water or go to the rest-room [R.T. 41].

Appellant did some pacing, moving back and forth on both sides of the counter in the secondary office when he came in and before he was asked to be seated [R.T. 43-44]. Appellant's actions were such that Mr. Young felt it necessary to call another officer, and he felt the appellant had something concealed on his person [R.T. 45].

When the marihuana was found on Scott, something was said about a hitchhiker, and Mr. Young's recollection was that it was said by Mr.

Scott. It could have been, "That is what you get for picking up hitchhikers."
[R.T. 44-46].

Mr. Scott later asked Customs Agent Burnett for the metal suitcase which contained the Zigzag cigarette papers [R.T. 50].

Appellant stipulated that the contraband was in fact marihuana, heroin, and dexedrine.

The amount of \$300.00 was found on appellant and \$455.00 on Mr. Scott [R.T. 53]. The contraband was admitted into evidence and the government rested [R.T. 54].

At this point trial counsel for the appellant made an offer of proof, i.e., to call Mr. Harris, the United States Commissioner, to testify that when appellant and Scott were arraigned before him, Scott made a statement to the Commissioner that the narcotics found on appellant were Scott's and he (Scott) had secreted them in appellant's coat [R.T. 56-59]. And later, when resting, appellant preserved the offer [R.T. 79] and reiterated it the following morning [R.T. 85-87]. The court denied the offer [R.T. 58, 87].

It should be noted here that long before the above offer of proof was made and during government's case in chief, appellant attempted to force the government to call Mr. Scott as a government witness in its case in chief and objected to the government sandbagging Scott for rebuttal [R.T. 18-21]. The co-defendant Scott was available to be called as a witness [R.T. 86].

Appellant testified on his own behalf and stated that he lived in Los Angeles at the time of his arrest, December 30, 1966 [R.T. 60], that he had gone to Tijuana on December 29, had a few drinks, there was a power failure, he decided to leave Tijuana, and as he headed for his car he ran into Mr. Scott, the co-defendant, who asked appellant for a lift [R.T. 61]. He dropped Mr. Scott at the bus station in San Diego and appellant stayed at the U. S. Grant Hotel in San Diego that night; as appellant was leaving his hotel the next day, he ran into Scott on the street and gave him a lift to Tijuana [R.T. 62]. Appellant had gone to Tijuana to drink and sightsee as he was depressed and this was his last chance to let off a little steam before heading back East where his family was. His mother had sent him \$350.00 [R.T. 63-64]. Appellant and Scott separated in Tijuana and met again that evening for a few drinks [R.T. 64], and then proceeded to come back across the border [R.T. 66]. The car belonged to appellant's uncle [R.T. 65].

Appellant had his raincoat thrown over the back of the seat [R.T. 66] and left it laying there in the car [R.T. 67]. The suitcase in the trunk was Mr. Scott's [R.T. 67]. Scott was searched; they found a package in Scott's back, placed Scott under arrest, and frisked the appellant [R.T. 68]. Appellant was told to sit down and noticed his coat on the counter; he was scared and went to his coat for cigarettes and came up with something he knew wasn't supposed to be there [R.T. 69]. This was the contraceptives later taken from him, and he tried to conceal them down his pants leg,

unzipping his fly and hiding his hands with the coat [R.T. 70]. Prior to picking up the coat he had no knowledge there was heroin there, and did not know Scott had heroin, marihuana, or pills [R.T. 70].

On cross-examination appellant admitted he had been to Canada but stated he lived in Los Angeles and had been in California since 1962, had not known Mr. Scott in Canada and met him in Tijuana [R.T. 71-73]. Later he stated he might have been in Canada in 1965 [R.T. 76-77]. Appellant had borrowed the car from his uncle but had not told him he was going to Tijuana [R.T. 73]. He didn't turn the contraband over to the officers and just wanted to get it away from him [R.T. 75]. He didn't remember bringing in his coat and didn't believe he paced back and forth before he got his coat [R.T. 76]. He did not know Mr. Scott in Los Angeles and had never met him before he met him in Tijuana that night [R.T. 77]. Mr. Scott didn't know appellant stayed at the U. S. Grant Hotel [R.T. 77].

On rebuttal, Mr. Russell testified that he did not bring in the appellant's coat and he was the only officer who searched the car; that appellant wore jockey type shorts and he saw the appellant pull out the two contraceptives; that the appellant seemed a little nervous upon first entering the office while both defendants were still standing; and that he found a temporary driver's license in the car in the name of J. L. Jones issued on the date of 12-29-66 [R.T. 88-90].

Mr. Young testified on rebuttal that Mr. Scott did not bring in

appellant's coat, that Scott took the coat Scott was wearing into the search room, that appellant became nervous when contraband was discovered on Scott and before he went to the coat for cigarettes [R.T. 91-93].

T. Z. Marshall testified that appellant was his wife's nephew, that appellant was in his home on December 29, 1966, and had a white man with him (the appellant) and he believed Mr. Scott was that man [R.T. 96-97].

George Winterfield testified that he was an Oregon State Policeman; that on December 28, 1966, he stopped a driver, Joseph Raymond Scott, driving a two-tone blue 1959 Chevrolet sedan with British Columbia plates which have a white background with blue letters; and that Scott was accompanied by a Negro male [R.T. 110-111]; that the car was going south and co-defendant Scott was the same man he stopped [R.T. 111-112]. He could not identify the appellant as the passenger [R.T. 113].

T. Z. Marshall then testified that when his nephew (the appellant) and the white man came to his house on December 29 they were in a Chevrolet with white plates [R.T. 114-115].

Several deputy Marshals and appellant were called to testify by appellant in an effort to show Mr. Marshall's identification of Mr. Scott could have been erroneous, and appellant testified the white man with him on December 29 was a Mr. Stevens whom he could not locate. He admitted having a brother in Vancouver.

V.

ARGUMENT

A. THE ARREST OF THE APPELLANT WAS LEGAL AND DID
NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant's first argument is based on the erroneous theory that appellant was arrested before the contraband was found in his possession, i.e., that detention at the border for a customs search on entry into the United States constitutes an arrest.

The record in this case indicates that the appellant drove an automobile into the United States from Mexico, and while he and his passenger stated they were bringing nothing from Mexico, nevertheless appellant appeared to be "under the influence of alcohol or something" and when he opened the trunk "numerous clothing and things were in the car."

It is evidently appellant's contention, "that the arrest in this case took place when the officers ordered the defendant to the secondary place of search and out of the car" [Appellant's Brief, p. 15]. This contention is based on those cases cited by appellant which state that an arrest occurs when officers "restrict (ones) liberty of movement." However, it is interesting to note that appellant's liberty of movement had already been restricted by his being forced to stop at the primary inspection point and to thereupon open his trunk. If referring one to the secondary inspection area constitutes an arrest, why not also the stopping of the car and the searching of the trunk at the primary inspection area. Certainly appellant's "liberty of

movement" was "restricted" at primary.

Just stating this proposition, however, tends to show the ridiculousness of appellant's basis for his argument. And there are countless cases, even beyond and without border situations, which have either unequivocally sanctioned the practice of detaining without an arrest occurring or have referred to it approvingly in dictum. To cite just those in the Ninth Circuit:

Gilbert v. United States, 366 F.2d 923, 928 (1966);

Wilson v. Porter, 361 F.2d 412 (1966);

Davis v. State of California, 341 F.2d 982 (1965);

Busby v. United States, 296 F.2d 328 (1961).

And analogous to border checks of course are the cases holding that a detention for a traffic check is not an arrest:

Myricks v. United States, 370 F.2d 901 (5th Cir. 1965);

Lipton v. United States, 348 F.2d 591 (9th Cir. 1965);

D'Argento v. United States, 353 F.2d 327, 333-334 (9th Cir. 1965).

Perhaps the longest line of State cases adopting the non-arrest position is found in the California authorities, where precedent for a right to detain for investigation can be traced back more than half a century. One of the earliest decisions in that jurisdiction to so hold is Gisske v. Sanders, 9 Cal. App. 13, 98 Pac. 43 (1908), involving a civil action for false imprisonment. Reversing a lower court judgment for the plaintiff, the California Court of Appeals ruled that a peace officer had the right to

stop and question a person and, if he refused to identify himself, to take him to the police station for further investigation. The Court held, in addition, that a search of the suspect's person which had occurred on the way to the station was a reasonable safety precaution which the officers might undertake regardless of whether or not the party was under arrest. Since the Gisske decision, a substantial body of opinion has developed in California recognizing the right of the police to stop and question when "such a course of action is necessary to the proper discharging of the officer's duties."

People v. Machel, 44 Cal. Rptr. 126, 131 (1965).

I have cited the above cases not because these seem particularly applicable to the case at hand but to rebut the generalities of appellant's argument.

To be more precise in the case at hand, we have to go to the United States Code Sections which authorize Customs detentions and searches in the first place. These sections are Title 19, United States Code, Sections 482 and 1582. Section 482 reads as follows in pertinent part:

"Any of the officers may stop, search, and examine any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States contrary to law." (19 U.S.C. 482, emphasis added).

Section 1582 empowers the Secretary of the Treasury to promulgate regulations affecting searches of persons and baggage and the following regulation has been promulgated:

"(d) A Customs officer may stop any vehicle arriving in the United States from a foreign country for the purpose of examining the manifest or inspecting or searching the vehicle and may stop, search, and examine any vehicle or person within the limits of the United States on which or on whom he may have reasonable cause to believe there is merchandise subject to duty or which has been introduced into the United States contrary to law." (19 C.F.R., Sec. 23.1).

The constitutionality of Customs searches under these provisions have been sustained. Murgia v. United States, 285 F.2d 14 (9th Cir. 1960). The Court there held that there is no requirement of probable cause before Customs agents can initiate a stopping and search.

Furthermore, there are several cases which specifically support the contention that a Customs detention is not an arrest:

United States v. Jones, 184 F. Supp. 329 (D.C. Calif. 1960);

United States v. Davis, 259 F.Supp. 496 (D.C. Mass. 1966);

People v. Mitchell, 26 Cal. Rptr. 89, 209 C.A.2d 312 (1966),

cert. denied 83 S.Ct. 1902, 374 U. S. 845.

In Jones, cited above, a disembarking soldier from Korea was taken

in a United States Customs vehicle to Military Police Headquarters approximately one-half mile away for the purpose of searching his baggage and person; the Court held that defendant's detention incidental to the Customs search did not constitute an arrest (p. 331). While it is true, as appellant argues in regard to other cases, that in Jones there was advance information or a so-called "lookout", such as not the case in either Davis or Mitchell. In fact, Mitchell was a straight "border bust" where the defendant was coming from Mexico and was detained and searched solely because he had an expensive wrist watch and a considerable amount of money. Here we have a similar case when the appellant was also coming from Mexico and was "under the influence of alcohol or something" and his car contained "numerous clothing and things."

The fact that appellant was under the influence of "something" would certainly have been sufficient reason to suspect contraband of a narcotic or drug nature, and the fact his car contained "numerous clothing and things" should certainly support a stopping and search for dutiable items.

Since appellant in his argument on this point cites two Supreme Court cases (Henry v. United States, 361 U.S. 98, and Rios v. United States, 364 U.S. 253), perhaps the government should discuss them briefly. Henry involved a theft from interstate commerce with no customs involvement as in the case here. Furthermore, in that case the Government conceded both in the lower courts and on appeal that an arrest took place when the defendant's car was stopped, arguing that the agents then had probable cause to

believe a Federal crime was being committed. Thus the situation here was not even argued, and in any event the Court specifically limited its decision, stating,

"That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."
(p. 103, emphasis added).

Indeed, as one Federal judge put it, if Henry can be read as holding that any restriction of movement is an arrest, it propounds a rule that is "more honour'd in the breach than the observance." United States v. Thomas, 250 F.Supp. 771, 781 (1966).

In Rios v. United States, 364 U.S. 253 (1960), the other Supreme Court ruling cited by appellant, again no Customs detention was involved, the detention having stemmed from police officers patrolling of a neighborhood. It is also interesting to note that because of the confused factual situation, the Court avoided any decision on the detention and remanded the case to the District Court for a determination of just when the arrest occurred.

While the Supreme Court took no firm position on the Government's plea for explicit recognition of a right to make inquiry on suspicion, among the alternatives listed in the opinion for guidance of the Court below was the prosecution's contention "that the policemen approached the standing taxi only for the purpose of routine interrogation and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission."

The fact that this argument was included as a possible justification for the officers' conduct seems to suggest that, under some circumstances, a stop for routine questioning may be permissible even though cause to arrest is absent. And certainly, in view of the statutes and regulations, Customs stops and searches would be included in such circumstances.

Thus it seems clear that appellant was not arrested until after the contraband was found on his person and consequently his arrest was valid and legal.

B. THE SEARCH OF APPELLANT WAS LEGAL AND DID NOT
VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS.

The statutory, regulatory, and constitutional bases for the search has been set forth above. The record reveals a "border" search made because appellant appeared to be "under the influence of alcohol or something" and his car which he was driving into the United States from Mexico contained "numerous clothing and things." Certainly these facts indicate compliance with the quoted statutes and regulations and, if anything would tend to indicate a dereliction of duty if the officer had not had appellant and his car searched.

C. THE COURT PROPERLY SUSTAINED THE GOVERNMENT'S
OBJECTION TO HEARSAY EVIDENCE OF STATEMENTS OF
A CO-DEFENDANT EXCULPATING THE APPELLANT AND
TAKING FULL BLAME HIMSELF.

Appellant cites no federal decision in his third specification of error
but relies solely on the California case People v. Spriggs, 36 Cal. Rptr.
841.

The federal rule is clear: Declarations against penal interest as
opposed to pecuniary or proprietary interest, are not admissible.

Donnelly v. United States, 228 U. S. 243, 272 (1913);

Neal v. United States, 22 F.2d 52 (4th Cir. 1927);

Jeffries v. United States, 215 F.2d 225, 226 (9th Cir. 1954).

In any event, for any declaration against interest to be admissible,
the declarant must be unavailable since to hold otherwise would clearly
violate the hearsay rule. The usual case requires the declarant to be
dead though the Second Circuit has stated that "death, or at least in-
accessibility" is the condition necessary.

Syracuse Engineering Co. v. Haight, 97 F.2d 573, 575 (2nd Cir.
1938).

Here the record shows that the declarant (the co-defendant Scott)
was available and the government had no objection to the appellant calling

him as a witness [R.T. 86]. The record also shows that evidently the declarant was willing to testify and would not claim the fifth amendment [R.T. 20, 22-24, 86-87], but be that as it may, there is absolutely nothing in the record to show that appellant even attempted to call the declarant, who was available, as a witness. Certainly appellant should not now be allowed to complain that he couldn't get in hearsay testimony when the live witness himself was available. It is also interesting to note that appellant tried to force the government to call that witness [R.T. 19-21, 22-24]. In effect the government and appellant were playing games as to who should call the witness, the government not wishing to do so because he could be impeached and the appellant not wishing to do so because the witness would testify against him.

D. THERE WAS NO MATERIAL VARIANCE BETWEEN COUNTS
I and II OF THE INDICTMENT AND THE PROOF.

Appellant claims that Count I of the indictment charged appellant with violation of Title 21, United States Code, Section 173, while the proof and instructions were as to the elements and presumption contained in Section 174. A mere reading of the indictment refutes this claim. While it is true that Section 174 does not appear in the body of the charge and 173 does, nevertheless, Section 174 is specifically set forth not only in the title to the indictment but also in the title to Count I. This Court has held in Charles Emanuel White and John Lewis v. United States of

of America (9th Cir. No. 20,566, April 9, 1968) that such a method of charge constitutes no conflict (see footnote 1 at page 8 of that opinion).

In any event, with "U.S.C., Title 21, Section 174" designated both in the title to the indictment and the title of Count I, it is difficult to see how appellant was not properly advised of the charges against him. It should also be pointed out that the specific point here was not raised by appellant prior to nor during the trial. In fact, it was not raised at all until now, not even in the Statement of Points Intended To Be Relied Upon On Appeal filed with this Court.

Appellant also contends that Count II is defective since "appellant is merely charged with unlawfully importing marihuana into the United States contrary to law. A violation of Title 21, U.S.C., Section 176-a is not specifically charged therein." (Appellant's brief, p. 28). Again it must be pointed out that "U.S.C., Title 21, Sec. 176a" appears both in the title to the indictment and the title to Count II as the specific charge.

Finally, in answering appellant's Specification IV, it should be noted that Rule 7(c) Federal Rules of Criminal Procedure, has eliminated both the technical niceties and the common law application to indictments. The leading case on questions involving sufficiency of the indictment is Hagner v. United States, 285 U.S. 427 (1931). In that case, the Court at page 431 stated, "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects not prejudicial, will be disregarded."

How the appellant could have been prejudiced by technicalities raised as an afterthought is difficult to see.

Coincidentally with his variance argument appellant has challenged the trial court's instructions giving the statutory presumptions contained in Title 21, Sections 176(a) and 174 of the United States Code. In Klepper v. United States, 331 F.2d 694 (9th Cir. 1964) the statutory presumption of Section 176(a) was included in the trial court instructions and this court found no error. Similarly, in regard to Section 174, in United States v. Armone, 363 F.2d 385 (2nd Cir. 1966) the trial court's giving of the statutory presumption in its charge to the jury was upheld. Certiorari in that case was denied, Armone et al v. United States, 385 U. S. 957 (1967).

Since appellant cites no cases in this regard, further comment here seems unnecessary.

E. THE STATUTORY PRESUMPTIONS CONTAINED IN TITLE 21,
UNITED STATES CODE, SECTIONS 174 and 176(a) ARE
CONSTITUTIONAL.

Appellant admits that the present law is that the presumptions here referred to are constitutional (Appellant's Brief, p. 28), but urges this Court to change the law by merely referring to Griffin v. California, 380 U. S. 609 (1965); Mallory v. Hogan, 378 U. S. 1 (1963); and Miranda v. Arizona, 384 U. S. 436 (1965), without comment.

It should be pointed out that the presumption involved here was held constitutional over forty years ago in Yee Hem v. United States, 268 U. S. 178 (1925), and has been consistently so held ever since.

Agobian v. United States, 323 F.2d 643 (9th Cir. 1963);

Brown v. United States, 370 F.2d 874 (9th Cir. 1966);

Juvera v. United States, 378 F.2d 433 (9th Cir. 1967).

It is interesting to note that Brown and Juvera were decided by this Court after the three cases appellant cites as a basis for changing the law. In fact, the Brown case even refers to Griffin but still holds the presumption constitutional and not violative of a defendant's Fifth Amendment right against self-incrimination. It further held that the giving of an instruction thereon did not constitute comment on a defendant's failure to testify when the instruction was amplified in a similar manner to that done in this case (see R.T. 145-146) in the case at bar and the footnote 1, page 875, of the Brown case.

VI.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.,
United States Attorney

MOBLEY M. MILAM,
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



MOBLEY M. MILAM

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

LENNARD L. MEAD; ALBERT CHUNN; A. V. HOHN;
RICHARD QUINE; ALDEN JOHNSON; VIOLET
MEAD; and RAY R. SENCE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX FOR THE UNITED STATES

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

WILLIAM M. BYRNE, Jr.,
United States Attorney,

JOHN C. ELDRIDGE,
HOWARD J. KASHNER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,180

UNITED STATES OF AMERICA,

Appellant,

v.

LENNARD L. MEAD; ALBERT CHUNN; A. V. HOHN;
RICHARD QUINE; ALDEN JOHNSON; VIOLET
MEAD; and RAY R. SENCE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF AND APPENDIX FOR THE UNITED STATES

JURISDICTIONAL STATEMENT

The United States commenced this action on July 1, 1964,
pursuant to 28 U.S.C. 1345 and 31 U.S.C. 231-233, to recover
statutory forfeitures and double damages for violations of the
false Claims Act, and to recover payments made by mistake. ^{1/}
On April 18, 1967, the district court (Peirson M. Hall, J.),

/ The action also sought to enforce administrative claims for
damages, but these claims are not at issue in this appeal.

after a non-jury trial, entered its judgment that the United States "recover nothing from any of the defendants" (Tr. 108 109). ^{2/} Notice of appeal was filed on June 15, 1967 (Tr. 110-111). This Court has jurisdiction of this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

A. The Agricultural Conservation Program

This case arises out of the United States Department of Agriculture's Agricultural Conservation Programs for 1957, 1958, and 1959, administered by the Department pursuant to the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590a-590q (1958 ed.). The regulations governing the Agricultural Conservation Programs for 1957, 1958, and 1959, are found, respectively, at 21 Fed. Reg. 5034 et seq., 22 Fed. Reg. 6428 et seq., and 23 Fed. Reg. 5247 et seq. Under these programs, the United States shared with farmers and ranchers in the continental United States the cost of carrying out approved soil and water conservation practices such as constructing erosion control dams and water diversion ditches on the farmers' or ranchers' lands. The maximum Federal cost-share for each approved practice was to be "the percentage of the average cost of performing the

^{2/} "Tr." refers to the Transcript of Record filed in this Court. "Tp." refers to the district court reporter's Transcript of Proceedings, copies of which have been lodged with the Court.

practice considered necessary to obtain the needed performance of the practice, but which will be such that the farmer or rancher will make a substantial contribution to the cost of performing the practice." 1959 Regulations, Section 1101.1011(a), 23 Fed. Reg. 5250. ^{3/} Thus, the farmer or rancher was required to pay that part of the cost of conservation materials or services furnished through the program for use in carrying out an approved practice which was "in excess of the * * * Federal cost-share" attributable to the use of the material or service. ^{4/} 1959 Regulations, Section 1101.1027(b), 23 Fed. Reg. 5252.

In the case at bar, the Federal cost-share for approved conservation practices was to be the lesser of (1) a fixed percentage of the total cost of the practice (e.g., 80% of the total cost), or (2) a fixed price per unit of work performed (e.g., 30 cents per cubic yard of earth moved) times the number of units of work performed (Tp. 44-45, 48-49). In no event could the Federal cost-share per farmer or rancher per program year exceed an allowable maximum amount (e.g., \$2,500) (Tp. 40).

Under the programs, the farmer or rancher first filed with the appropriate County Agricultural Stabilization and Conservation Committee a request for Agricultural Conservation Program cost-sharing (Form ACP-201). The County Committee approved the

^{3/} Identical provisions are found in Section 1101.811(a) of the 1957 Regulations, 21 Fed. Reg. 5036, and Section 1101.911(a) of the 1958 Regulations, 22 Fed. Reg. 6485.

^{4/} Identical provisions are found in Section 1101.827(b) of the 1957 Regulations, 21 Fed. Reg. 5038, and Section 1101.927(b) of the 1958 Regulations, 22 Fed. Reg. 6486-6487.

request if it appeared to be proper, determined the maximum allowable Federal cost-share, and notified the farmer or rancher accordingly. After completion of the approved practice, the farmer or rancher would file an application for payment (Form ACP-245) with the County Committee for that portion of the cost of the practice which the Government had obligated itself to pay. If the farmer or rancher had elected to have the County Committee execute a purchase order for conservation materials and services (Form ACP-250) to an approved contractor hired by the farmer or rancher to furnish conservation materials or services (the purchase order plan), the contractor, rather than the farmer or rancher, would receive the Federal cost-share payment (Tr. 101-103; Tp. 26-43).

B. The Facts of the Instant Case

In the case at bar, various farmers and ranchers filed requests with the Ventura, California County Committee for Agricultural Conservation Program cost-sharing. The requests were duly approved, and the practices were carried out by the defendant-appellee, Lennard L. Mead, a private contractor authorized by the Department of Agriculture to furnish conservation materials and services under the purchase order plan. Following completion of the practices, the farmers and ranchers filed with the County Committee applications for payment of their Federal cost-shares supported by invoices to them prepared by Mead.^{5/} In most instances, the Government paid the cost-shares directly to Mead under the purchase order plan (see infra, pp.

^{5/} In this brief, we refer to defendant-appellee Lennard L. Mead as "Mead," and to defendant-appellee Violet Mead as "Violet Mead." Violet Mead was named as a defendant in the complaint.

Following an investigation, the Department of Agriculture determined that Mead's invoices overstated his actual charges to the farmers and ranchers for the materials and services he furnished in carrying out the approved practices, and that Mead and the farmers and ranchers were aware of this when the applications for payment of Federal cost-shares were filed (Tr. 105-06). Thereafter, the United States commenced this action against Mead and certain of the farmers and ranchers to recover statutory forfeitures and double damages under the False Claims Act, and to recover payments made by mistake (Tr. 2-32). ^{6/}

The Evidence Adduced at Trial

The defendant-appellee Mead testified that he knew that the Federal cost-share payments that he would receive from the Government under the purchase order plan were "based upon the cost [to the farmer or rancher] of the project," and admitted that "in some cases" he gave the farmers and ranchers a "cash discount" and prepared simultaneously two invoices -- one for the Government, and another showing his discount for the farmer or rancher (Tp. 110-111, 140-141, 152-153). Mead stated that he usually sent a copy of the invoice he prepared for the Government to the farmer or rancher, and that, at about the same time, he also mailed or gave them the other invoice showing a discount (Tp. 140-141, 172, 210, 383-384).

The Government's attempt to recover payments made by mistake is alternative to its False Claims Act claims except insofar as the statute of limitations may have run with respect to certain violations of the False Claims Act. As noted above, the Government also sought to enforce administrative claims for damages, but these are not involved in this appeal.

Mead also claimed that while the invoices he prepared for submission to the Government did not reflect what he received from the farmer or rancher for his materials and services, they nevertheless reflected the "true cost" of the conservation practices (Tp. 153). He explained that he was never informed that it was necessary to show his discounts on the invoices sent to the Government, and that he did not do so "because the Government informed me they wanted a full cost" (Tp. 158).

The evidence with respect to the particular transactions which Mead had with the farmers and ranchers involved in this appeal may be summarized as follows:

Mead and Quine

On January 12, 1959, defendant-appellee Richard Quine filed with the County Committee a request for Federal cost-sharing for the construction of an erosion control dam and diversion ditch on his premises in Moorpark, California (Pltf's. Exh. No. 44). His application was duly approved, and on April 12, 1959, Quine filed an application for payment supported by an invoice prepared by Mead showing that the cost of constructing these practices was \$3,956.09 (Pltf's. Exh. Nos. 40-42). The Government paid Mead \$2,389.80 on the basis of the application for work performed for Quine under the purchase order plan (Tr. 14, 44-45, 79; Pltf's. Exh. Nos. 37-38). Instead of paying the difference between the total reported cost (\$3,956.09) and the Government's cost-share (\$2,389.80), which amounted to \$1,566.29

rsuant to their agreement Quine paid Mead only \$500 in cash
r his work and did not contribute any property or services to
e projects (Tp. 142, 145, 219-221, 262-263, 266).

In a pre-trial statement Quine admitted that "Mead's state-
nt was in excess of the agreed price, so he discounted his
atement to coincide with the previous agreement" (Pltf's. Exh.
. 80). At the trial, however, Quine claimed that he could not
call seeing any invoices from Mead (Tp. 264-265). Quine con-
nded that his pre-trial statement referred to a "discussion
* * long after I had paid Mr. Mead," and that he learned that
e practices cost more than the original estimate after he paid
ad for his work (Tp. 277, 279A).

ad and Johnson

On January 26, 1959, defendant-appellee Alden Johnson filed
request for Federal cost-sharing for the construction of a
version ditch, and for pipe and concrete for a mechanical out-
t, on his Moorpark, California land (Pltf's. Exh. No. 55).
e County Committee duly approved Johnson's request, and on
ril 12, 1959, Johnson filed an application for payment supported
an invoice prepared by Mead showing that the cost of construct-
g these practices was \$1,849.75 (Pltf's. Exh. Nos. 50-51, 53).
e Government paid Mead \$1,156.90 on the basis of this applica-
on for work performed for Johnson under the purchase order
an (Tr. 17, 79-80; Pltf's. Exh. Nos. 47-49). Instead of paying
e difference between the total reported cost (\$1,849.75), and
e Government's cost-share (\$1,156.90), which amounted to \$692.85,

pursuant to their agreement Johnson paid Mead only \$317.40, did not contribute any property or services to the practices (Tp. 171, 173-174, 219-221, 289).

Mead admitted that he gave Johnson a "discount" of \$281. but contended that the Government had nevertheless been billed at a "true cost" figure (Tp. 156, 158, 174). In Mead's words "I billed the Government a true cost figure. I accepted from Mr. Johnson all I could get" (Tp. 156). For his part, Johnson stated that he did not recall receiving any invoices from Mead and maintained that he was unaware that Mead had given him a discount (Tp. 286-290).

Mead and Violet Mead

On March 13, 1958, defendant-appellee Violet Mead, defendant-appellee Lennard Mead's mother, filed with the County Committee a request for Federal cost-sharing for the construction of an erosion control dam on her Moorpark, California land. Her application was duly approved, and on May 6, 1958, she filed an application supported by an invoice prepared by her son showing that the total cost of the practice was \$2,888. On the basis of this application, the Government paid Mr. Mead \$2,175 for work performed for Violet Mead under the purchase order plan (Tr. 20-21, 47-48, 80; Tp. 183-185; Pltf's. Exh. Nos. 71-73A). Mr. Mead did not receive any kind of payment from his mother for this work (Tp. 187).

d and Sence

On February 26, 1959, defendant-appellee Ray R. Sence requested Federal cost-sharing for the construction of a mechanical let on his premises in Burbank, California. His application was y approved by the County Committee, and on March 30, 1959, ce filed an application for payment supported by an invoice pared by Mead showing that the cost of constructing the ctice was \$4,314.35 (Pltf's. Exh. Nos. 56, 59-60). The Govern- t paid Mead \$2,500 on the basis of this application for work formed for Sence under the purchase order plan (Tr. 24-25, 46, 66, 79-80; Pltf's. Exh. Nos. 57-58, 61). Although the ference between the total reported cost (\$4,314.35) and the ernment's cost-share (\$2,500) amounted to \$1,814.35, Sence eed to pay Mead only \$800 for his work, and purportedly gave d \$172.41 in cash and also paid \$627.59 for pipe purchased used by Mead on the project (Tp. 176, 180, 183, 187, 292, -297, 367; Def's. Exh. S-B).

Mead admitted that he prepared another invoice showing a count and mailed it to Sence (Tp. 183). For his part, Sence tified that Mead billed him for \$800; that he never saw the oice submitted to the Government; and that he merely signed purchase orders and was not aware that anything on them was orrect when he signed (Tp. 294-296, 369-370).

The invoice received by the Government stated that Sence had nished reinforcing steel and forms, but did not mention the e purportedly paid for by Sence (Pltf's. Exh. No. 60).

pursuant to their agreement Johnson paid Mead only \$317.40, and did not contribute any property or services to the practices (Tp. 171, 173-174, 219-221, 289).

Mead admitted that he gave Johnson a "discount" of \$281.20 but contended that the Government had nevertheless been billed at a "true cost" figure (Tp. 156, 158, 174). In Mead's words "I billed the Government a true cost figure. I accepted from Mr. Johnson all I could get" (Tp. 156). For his part, Johnson stated that he did not recall receiving any invoices from Mead and maintained that he was unaware that Mead had given him a discount (Tp. 286-290).

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he invoice received by the Government stated that Sence had ished reinforcing steel and forms, but did not mention the purportedly paid for by Sence (Pltf's. Exh. No. 60).

Mead and Graham

On March 13, 1958, Gale B. Graham ^{8/} filed a request for Federal cost-sharing for the construction of an erosion control dam on his Santa Paula, California land. His application was duly approved, and on May 8, 1958, Graham filed with the County Committee an application for payment supported by an invoice prepared by Mead showing that the cost of constructing this practice was \$3,268. On the basis of this application, the Government paid Mead \$2,500 for work performed for Graham under the purchase order plan (Tr. 28, 48, 80; Pltf's. Exh. Nos. 67-68, 70). The only remuneration Mead received for his material and services was the \$2,500 Federal cost-share; Graham did not contribute anything to the practice (Tp. 201-202).

Mead and Chunn

On April 3, 1959, defendant-appellee Albert Chunn filed with the County Committee a request for Agricultural Conservation cost-sharing for the construction of an erosion control dam and version ditch on his premises in Moorpark, California. The application was duly approved, and on June 18, 1959, Chunn filed an application for payment supported by an invoice prepared by Mead showing that the cost of constructing these practices was \$4,800. On the basis of this application, the Government paid Mead \$2,500 for work performed for Chunn under the purchase order plan (Tr. 43, 52-53, 79; Pltf's. Exh. Nos. 1-5, 15). Although the differ

^{8/} Graham was not joined as a defendant in this case.

tween the total reported cost (\$4,464) and the Federal cost-
are (\$2,500) amounted to \$1,964, Mead's testimony indicates
at Chunn did not make payments or contributions in that amount
Mead. ^{9/}

Mead admitted that he gave Chunn a cash discount and that
gave Chunn a discounted invoice when he billed the Government
p. 111-112, 116-117, 208-209). Chunn, however, maintained that
was unaware of the discount Mead had given him and that he
did not received a discounted bill from Mead. Chunn claimed that
received a copy of the invoice Mead sent to the Government
ter the purchase orders he signed were sent to the Government
p. 227-229, 232-233).

Mead received no cash payments from Chunn (Tp. 211). He and
Chunn never spoke to one another with respect to the value of
Chunn's purported contributions to the practices or with respect
to the value of Chunn's purported non-cash payment to Mead for
the latter's materials and services (Tp. 208-209, 226-227, 232,
35-406). Mead and Chunn gave conflicting estimates of the
value of Chunn's purported non-cash payments to Mead. According
to Mead, the invoice for \$4,464 which he prepared for the
Government reflected only charges for his own materials and
services (Tp. 130-132). Mead also asserted that he valued Chunn's
work on the dam at \$665, and that he gave Chunn a credit of \$600
for the use of his pasture (Tp. 112-113). For his part, Chunn
testified that he and Mead had agreed that Mead would receive the
\$500 Federal cost-share for his materials and services (Tp. 226);
that while he did not participate in computing Mead's \$4,464
bill, that bill included his own contributions to the practices
(p. 405-408). Chunn claimed that his contributions were greater
than those stated by Mead (Tp. 237-238, 394-399; Def's. Exh. C-B).
Although Chunn was admittedly instructed by a County Committee
representative before he requested Federal cost-sharing to record
costs comprising his own contributions and to list those costs
on his bill to the Government, he failed to advise the Government
that he had purportedly furnished materials and services until
after Mead received the \$2,500 Federal cost-share payment
(p. 227, 244, 400, 404-405).

Mead and Hohn

On January 7, 1957, defendant-appellee A. V. Hohn filed with the County Committee a request for cost-share payments for the construction of an erosion control dam on his premises in Moorpark, California. The application was duly approved, and on April 30, 1957, Hohn filed with the Committee an application for payment supported by an invoice prepared by Mead showing that the cost of constructing this practice was \$2,014. The Government paid \$1,500 to Hohn on the basis of this application (Tr. 11, 47, 60, 79; Pltf's. Exh. Nos. 17-18, 22). Hohn did not give Mead any cash for his work (Tp. 249-250). Mead in effect admitted that he gave Hohn a discount of \$514 in connection with the 1957 work (Tp. 133). He also testified that Hohn contributed an estimated \$450 to \$540 in equipment and services to the 1957 project, but that these contributions were not listed in the invoice he prepared for the Government (Tp. 119, 121, 132-133).

On January 21, 1958, Hohn filed with the County Committee another request for cost-share payments for the construction of an erosion control dam on his premises. This application was duly approved, and on February 20, 1958, Hohn filed with the Committee an application for payment supported by an invoice prepared by Mead showing that the cost of constructing this practice was \$2,580. On the basis of this application, the Government paid \$2,064 to Mead for work performed for Hohn under the purchase order plan (Tr. 11-12, 47, 60, 79; Pltf's.

Exh. Nos. 23-25, 27). Although the difference between the total reported cost (\$2,580) and the Federal cost-share (\$2,064) was \$516, Mead received no cash from Hohn for this work (Tp. 134-135, 249-250) and claimed only that he received from Hohn a trailer valued at \$416, and, possibly, some sheep worth \$60 (Tp. 134-137).

On January 8, 1959, Hohn filed with the County Committee a third request for Federal cost-sharing for the construction of an erosion control dam. The application was duly approved, and on March 27, 1959, Hohn filed with the Committee an application for payment supported by an invoice prepared by Mead showing that the cost of constructing this practice was \$1,377. On the basis of this application, the Government paid Mead \$804.50 for work performed for Hohn under the purchase order plan (Tr. 9-10, 44, 59, 79; Pltff's. Exh. Nos. 28-29, 31, 33-34, 36). Again, Hohn did not pay Mead any cash for his work (Tp. 249-250). Mead admitted that he gave Hohn a discount of \$352.20 in 1959, and that he prepared two invoices for Hohn in that year (Tp. 136-140). Mead claimed, however, that Hohn paid him the difference between the Federal cost-share and his discounted bill by giving him the use of pasture land (Tp. 136-138). ^{10/}

^{10/} For his part, Hohn testified that he gave Mead some sheep worth \$20 each, a trailer worth approximately \$1,000, approximately \$640 worth of pasture, and the use of equipment and some labor during 1957-1959 as payment for his materials and services (Tp. 248-259).

D. The Decision of the District Court

At the close of the trial, the district court expressed view that the United States had not established any violation of the False Claims Act, and was not entitled to recover under its alternative theory of mistake (Tr. 449-450). The district court thereafter entered a judgment that the United States "recover nothing from any of the defendants" (Tr. 108-109).

The district court found, inter alia, that Mead and the farmers and ranchers understood that a portion of the total cost of the conservation work was to be charged to the farmer or rancher (Finding 15); that Mead advised the farmers and ranchers that he would perform conservation work for them "at a cost commensurate with" their ability to pay, and would, in certain cases, accept non-cash payments (Finding 17); that in cases where the work was done under such agreement, Mead prepared, and sent to the farmer or rancher involved, a separate invoice showing that Mead was giving the farmer or rancher a "discount" and that the farmer or rancher was paying "less than his proportionate share of the total cost of the work" performed by Mead (Finding 18); and that the documents filed with the United States "did not reflect the arrangements between the defendant Mead and the other defendants * * *" (Finding 20) (Tr. 103-104).

Despite these findings, the district court concluded that none of the defendants filed a claim against the United States which was false within the meaning of the False Claims Act; that no payments were made by the United States to any of the

defendants under a mistake; and that the United States was not entitled to recover any amount from any of the defendants (Tr. 106). 11/ These conclusions, apparently, were based on the court's additional findings (Tr. 103, 105):

14. In no instance in this case was the information submitted on Forms ACP-245 or ACP-250 by any of the defendants incorrect or false insofar as it reflected a price per unit of the work to be performed other than the actual price or an amount of units other than the number of units of such work actually performed and on which reimbursement was to be based.

* * * * *

21. Based upon the Forms ACP-245 and ACP-250 introduced in this case, an agreed percentage of the total cost, as properly reflected thereon and properly chargeable to the United States of America was paid on behalf of the respective landowners.

22. In no instance has it been shown herein that any payment actually made by the United States pursuant to said forms was in excess of the fair market value of the work done on behalf of the farm owner and pursuant to the Agricultural Soil Conservation Program or in excess of the fair value of the United States' agreed share of the cost.

23. In no instance was the actual value of the work done shown to be less than the value represented by the defendant MEAD.

11/ As already noted, this appeal does not question the district court's additional denial of the Government's administrative claims against the defendants (Tr. 105-106).

STATUTE AND REGULATIONS INVOLVED

1. The False Claims Act provides in pertinent part:

R.S. § 3490 (1878):

Any person * * * who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing of such act * * *.

R.S. § 5438 (1878):

Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, * * * shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars. 12/

12/ The civil portion of the False Claims Act has been codified at 31 U.S.C. 231. The criminal portion has been altered (see 18 U.S.C. 287 and 1001), but R.S. § 3490 incorporates, unchanged, the criminal provisions as set out in R.S. § 5438. Rainwater United States, 356 U.S. 590, 592-593.

2. The regulations governing the Agricultural Conservation Program for 1959 (23 Fed. Reg. 5247 et seq.) provide in pertinent part:

§ 1101.1001 General program principles.
The 1959 National Agricultural Conservation Program has been developed and is to be carried out on the basis of the following general principles:

(a) The national program contains broad authorities to help meet the varied soil and water conservation problems of the Nation. State and county committees and participating agencies shall design a program for each State and county. Such programs should include any additional limitations and restrictions necessary for the maximum conservation accomplishment in the area. The programs should be confined to the soil and water conservation practices on which Federal cost-sharing is most needed in order to achieve the maximum conservation benefit in the State or county.

* * * * *

§ 1101.1011 Rates of cost-sharing.
(a) The maximum Federal cost-share for each practice shall be the percentage of the average cost of performing the practice considered necessary to obtain the needed performance of the practice, but which will be such that the farmer or rancher will make a substantial contribution to the cost of performing the practice. Rates of cost-sharing shall not be in excess of 50 percent of the average cost of performing the practices, except that:

* * * * *

§ 1101.1027 Conservation materials and services--

* * * * *

(b) Cost to farmer or rancher. The farmer or rancher will pay that part of the cost of the material or service, as established under instructions issued by the Administrator, ACPS, which is in excess of the Federal cost-share attributable to the use of the material or service or, upon request by the farmer or rancher and approval by

the county committee, the farmer or rancher will pay that part of the cost of the material or service which is in excess of the farmer's or rancher's Federal cost-share for all components of the practice which will likely be completed during the program year. The Federal cost-share increase on the amount of the Federal cost-share so determined may be advanced as a credit against that part of the cost of the material or service required to be paid by the farmer or rancher.

* * * * *

The regulations governing the Agricultural Conservation Program for 1957 and 1958 are identical to the above-quoted provision

SPECIFICATION OF ERRORS

1. The district court erred in failing to hold that the defendant-appellee Mead violated the False Claims Act by knowingly making false bills and claims for the purpose of obtaining payment of false claims upon or against the United States.

2. The district court erred in failing to hold that the United States sustained damages by reason of the aforesaid violations of the False Claims Act.

3. The district court erred in failing to hold that the United States is entitled to recover damages from defendant-appellee Mead for Federal cost-share payments made by mistake.

4. The district court erred in failing to hold that the other defendants-appellees violated the False Claims Act by knowingly making false claims upon or against the United States.

5. The district court erred in failing to hold that the United States is entitled to recover damages from the other defendants-appellees for Federal cost-share payments made by mistake.

13/ See Sections 1101.801(a), 1101.811(a), and 1101.827(b) of the 1957 Regulations, 21 Fed. Reg. 5035, 5036, 5038; and Sections 1101.901(a), 1101.911(a), and 1101.927(b) of the 1958 Regulations, 22 Fed. Reg. 6483-6484, 6485, 6486-6487.

SUMMARY OF ARGUMENT

The undisputed evidence in this case establishes that the defendant-appellee Mead prepared invoices which intentionally overstated Mead's actual charges to farmers and ranchers for his conservation materials and services, and that these false invoices, submitted in support of the farmers' and ranchers' applications for payment of Federal cost-shares, were used by the Government in computing the amount of its share of the cost of those practices. Thus, under the plain terms of the False Claims Act, defendant-appellee Mead knowingly made a false bill or claim for the purpose of obtaining or aiding to obtain the payment * * of" a false claim, and was, therefore, liable under the Act for statutory forfeitures for each such violation and for double the amount of damages which the United States sustained thereby.

The district court seems to have absolved defendant-appellee Mead (and the other defendants-appellees) from any liability under the False Claims Act on the theory that the payments made by the Government did not exceed the "fair market value" of Mead's work or the "fair value" of the Government's agreed share of the cost, and that in no case was the "actual value" of the work done less than the value represented by Mead. In so ruling, the court plainly erred, for the amount of the Federal cost-shares payable under the conservation programs here involved clearly depended solely upon the cost of the approved conservation practices, and was in no way related to "value."

The district court's theory as to "value" comes down to contention that the United States did not sustain any actual damages by reason of Mead's misrepresentations. In this respect, too, the court erred. First, the Supreme Court has clearly held that the United States may recover statutory forfeitures under the False Claims Act whether or not it sustains actual damages. Second, the United States did incur actual damages by virtue of Mead's misrepresentations. For Mead's false invoices caused the Government to pay out more money than it would have paid if a true invoice had been submitted, and Mead's scheme permitted the farmers or ranchers to pay less than their proportionate share of the cost of the practices.

Thus, the district court clearly erred in failing to hold (1) that defendant-appellee Mead violated the False Claims Act, (2) that the United States sustained actual damages by virtue of such violations; and (3) that the Government is entitled to recover payments made by mistake. ^{14/}

With respect to the defendants-appellees other than Mead there is also no question that they filed false claims with the United States and thereby caused it to sustain damages. In Mead's case, it is undisputed that the invoices prepared by him intentionally overstated the costs of the practices, and it is

^{14/} As stated above, the mistake claims are alternative to the claims under the False Claims Act except insofar as the statutory limitations may have run with respect to certain violations of the False Claims Act.

thus clear that he "knowingly" made false bills and claims for the purpose of obtaining payment of false claims upon or against the United States. While the district court made no specific findings as to the knowledge of the other defendants-appellees, and most of them professed a lack of knowledge, we submit that, on the record in this case, the conclusion is inescapable that they "knowingly" made false claims, and that they, too, are liable to the United States for statutory forfeitures and double damages under the False Claims Act. ^{15/}

ARGUMENT

I

DEFENDANT-APPELLEE MEAD VIOLATED THE FALSE CLAIMS ACT BY KNOWINGLY MAKING FALSE BILLS AND CLAIMS FOR THE PURPOSE OF OBTAINING PAYMENT OF FALSE CLAIMS UPON OR AGAINST THE UNITED STATES. THE GOVERNMENT SUSTAINED ACTUAL DAMAGES BY REASON OF THOSE VIOLATIONS, AND IS ALSO ENTITLED TO RECOVER PAYMENTS MADE BY MISTAKE.

A. The False Claims Act is broadly phrased to reach any person who makes or causes to be made "any claim upon or against" the United States, "knowing such claim to be false * * *," or who knowingly makes or causes to be made a false "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for the purpose of "obtaining or aiding to obtain the payment or approval of" a false claim. R.S. § 5438 (1878). For the objective of Congress in enacting the statute "was broadly to protect the funds and property of the Government from fraudulent claims * * *." Rainwater v. United States, 356 U.S. 590, 592.

5/ The district court also had no basis for rejecting the Government's claim against the other defendants-appellees for payments

As the Supreme Court recently emphasized, "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigidly restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil [Footnote omitted]." United States v. Neifert-White Co., No. 267.--October Term, 1967, decided March 5, 1968, 36 U.S. Law Week 4189, 4190. Thus, in Neifert-White, the Supreme Court held that the False Claims Act "reaches beyond 'claims' which might be legally enforced, to a fraudulent attempt to cause the Government to pay out sums of money." Ibid.

In the case at bar, there can be no doubt that there were fraudulent attempts, ultimately successful, to cause the Government to pay out excessive sums of money. For the invoices which Mead prepared in support of the farmers' and ranchers' applications for payment of their Federal cost-shares were used by the Government in computing the amount of its share of the cost of the practices it had previously approved. See, e.g., Tp. 52, 74, 204. And, as the evidence in this case conclusively demonstrates (supra, pp. 5-13), and as the district court found, (supra, p. 14), those invoices intentionally overstated Mead's actual charges to the farmers and ranchers for his materials and services. Thus, in the language of the False Claims Act, Mead knowingly made a false bill or claim "for the purpose of obtaining or aiding to obtain the payment * * * of" a false claim, a

as, therefore, liable under the Act for statutory forfeitures of \$2,000 for each such violation and for double the amount of damages the United States sustained thereby.

B. The district court seems to have absolved Mead (and the other defendants-appellees) ^{16/} from any liability under the false Claims Act because it found that the payments made by the United States did not exceed the "fair market value" of the work done by Mead or the "fair value of the United States' agreed share of the cost" (Finding 22); and that in no case was the "actual value" of the work done less than the value represented by Mead (Finding 23) (Tr. 105). In so ruling, the court clearly erred. For the "fair market value" and "actual value" of Mead's work, or the "fair value" of the Government's agreed share of the cost, are utterly immaterial under the cost-sharing programs involved in the instant case. As the regulations plainly provide, supra, pp. 17-18), the amount of the Federal cost-share payable under the 1957, 1958, and 1959 programs depended solely upon the cost of the approved conservation practices, and was in no way related to "value." The record in this case clearly establishes that Mead's invoices overstated the actual costs of the practices supra, pp. 5-13), and that these inflated invoices were the basis upon which the Government computed the allowable Federal cost-share payments (see, e.g., Tp. 52, 74, 204).

^{16/} The liability of the other defendants-appellees is discussed in Point II, infra.

The district court's theory as to "value" comes down to the contention that the United States did not sustain any actual damages by reason of Mead's misrepresentations. As we demonstrate below, the Government did in fact sustain actual damages in the case at bar. We note, however, that the False Claims Act expressly provides that any person who violates its provisions "shall forfeit and pay to the United States the sum of two thousand dollars and, in addition, double the amount of damages which the United States may have sustained by reason of" the violation. R.S. § 3490 (1878). As the Supreme Court has held, the United States may therefore recover statutory forfeitures whether or not it sustains actual damages. Rex Trailer Co. v. United States, 350 U.S. 148, 152-153, fn. 5; United States ex rel. Marcus v. Hess, 317 U.S. 537, affirming, 41 F. Supp. 197, 218 (W.D. Pa.). See, also, United States v. Rohleder, 157 F. 2d 126 (C.A. 3); Toepleman v. United States, 263 F. 2d 697 (C.A. 4), certiorari denied, 359 U.S. 989; United States v. Rainwater, 244 F. 2d 27 (C.A. 8), affirmed, 356 U.S. 590; Fleming v. United States, 336 F. 2d 475 (C.A. 10), certiorari denied, 380 U.S. 907. ^{17/}

^{17/} The court's theory as to "value" may also have stemmed from the fact that the purchase order form (ACP-250) contained a reference to "fair price or sales price" and a certificate by the farmer or rancher that "the price paid to the vendor does not exceed the difference between the fair price, if applicable, and the payment by the Government." However, as explained at trial, the references to "fair price" were placed in the form during wartime solely to insure that the contractor did not receive excess profits (Tp. 317-318). As we have seen (*supra*, p. 23), the amount of the Federal cost-share payable under the 1957-1959 agricultural programs here involved depended solely upon the cost of the (Con

C. The district court found that the information submitted on the payment application (ACP-245) and the purchase order (ACP-250) forms was not "incorrect or false insofar as it reflected a price per unit of the work to be performed other than the actual price or an amount of units other than the number of units of such work actually performed and on which reimbursement was to be based" (Finding 14) (Tr. 103). The court also found that, based on these two forms, "an agreed percentage of the total cost, as properly reflected thereon and properly chargeable to the United States of America was paid on behalf of the respective landowners" (Finding 21) (Tr. 105). We note initially that these findings seem to contradict the court's other findings, viz., that Mead sent to the farmers and ranchers a separate invoice showing that they were receiving a "discount" and paying "less than * * * [their] proportionate share of the total cost of the work" performed by Mead (Finding 18); and that the documents filed with the United States "did not reflect the arrangements between the defendant Mead and the other defendants * * * " (Finding 20) (Tr. 104). ^{18/}

(Cont.) practices, and the inflated invoices submitted by Mead were the basis upon which the Government computed the allowable Federal cost-share payments.

It need only be added that the district court's findings with respect to "value" are based solely upon Mead's conclusory and self-serving testimony that the invoices he prepared reflected the "true cost" of the conservation practices and that the Government "got its money's worth" (Tp. 153, 382-383). The Government witness, Eldridge R. Cornell, merely testified that he could not express an opinion on the question of "value" (Tp. 98-100).

^{18/} The court's findings were actually prepared by counsel for defendants-appellees (Tp. 450-451).

In any event, the district court's findings (Nos. 14 and 21) are clearly contrary to the undisputed evidence in this case. To take a specific example, ^{19/} defendant-appellee Mead prepared an invoice showing that he was constructing an erosion control dam on the property of Violet Mead, his mother, at a total cost of \$2,888--7,600 cubic yards of earth at 38 cents per cubic yard. This invoice was false since Mr. Mead actually made no charge at all to his mother, and, in effect, was seeking to charge for his work only the amount of money he could obtain from the Government. The false invoice was submitted to the County Committee in support of Violet Mead's application for Federal cost-sharing. For the particular practice involved the Government's cost-share was computed on the basis of the lesser of 80% of the total cost, or 30 cents per cubic yard of earth moved times the number of cubic yards, with a \$2,500 maximum. The Government technician certified that the work had been completed according to specifications and contained 7,250 cubic yards. The Government thereafter paid Mr. Mead the sum of \$2,175 on the purchase order plan, computed as follows: 30 cents per cubic yard times 7,250 cubic yards equals \$2,175, which is less than the amount, \$2,310.40, arrived at by multiplying 80 percent times \$2,888 (the cost figure submitted by Mr. Mead). If the Government had been correctly informed that Mr. Mead was only seeking to

^{19/} See Tr. 20-21, 47-48, 80; Tp. 183-185, 187; Pltf's. Exh. Nos. 71-73A.

recover the Federal cost-share (\$2,175), it would only have paid out \$1,740--80 percent of \$2,175. ^{20/} Thus, in this instance, the Government made an overpayment to defendant-appellee Mead in the amount of \$435 (\$2,175 less \$1,740). Moreover, in addition to causing the Government to pay out more money than it would have paid if a true invoice had been submitted, Mr. Mead's scheme plainly frustrated the cost-sharing regulations, since instead of paying her proportionate share of the cost of the practice, Violet Mead paid nothing. ^{21/}

It is also evident from an examination of the other transactions set out above (supra, pp. 6-13) that in other instances as well Mead's invoices similarly overstated his costs, thereby (1) causing the Government to pay out more money than it would have paid if a true invoice had been submitted, and (2) permitting the farmer or rancher to pay less than his proportionate share of the cost of the practice.

In sum, the district court clearly erred in failing to hold that the appellee Mead violated the False Claims Act by knowingly making false bills and claims for the purpose of obtaining

^{20/} 30 cents per cubic yard times 7,250 cubic yards equals a greater sum, viz., \$2,175.

^{21/} As just seen, Mr. Mead is not absolved from liability under the False Claims Act by virtue of the fact that the Government technician certified the number of cubic yards in the completed practice. Under the Federal cost-share computation, Mr. Mead's false invoice plainly caused the Government to pay out more money than it would have paid if a true invoice had been submitted.

payment of false claims upon or against the United States, and in failing to hold that the United States suffered damages by reason of these violations of the False Claims Act. ^{22/}

II

THE OTHER DEFENDANTS-APPELLEES VIOLATED THE FALSE CLAIMS ACT BY KNOWINGLY MAKING FALSE CLAIMS UPON OR AGAINST THE UNITED STATES. THE GOVERNMENT SUSTAINED ACTUAL DAMAGES BY REASON OF THOSE VIOLATIONS, AND IS ALSO ENTITLED TO RECOVER PAYMENTS MADE BY MISTAKE.

With respect to the defendants-appellees other than Mead, there is also no question that they filed false claims with the United States and thereby caused it to sustain damages. In Mead case, it is undisputed that the invoices prepared by him intentionally overstated the costs of the practices, and it is thus clear that he "knowingly" made false bills and claims for the purpose of obtaining payment of false claims upon or against the United States. While the district court made no specific findings as to the knowledge of the other defendants-appellees, and most of them professed a lack of knowledge, we submit that, on the record in this case, the conclusion is inescapable that they "knowingly" made false claims upon or against the United States, and that they, too, are liable to the United States for statutory forfeitures and double damages under the False Claims Act.

22/ Even if the United States was not entitled to recover statutory forfeitures and double damages under the False Claims Act, the district court had no basis for rejecting the Government's attempt to recover against Mead payments made by mistake. The mistake claims are alternative to the claims under the False Claims Act except insofar as the statute of limitations may have run with respect to certain violations of the False Claims Act.

Mead testified that he usually sent a copy of the invoice he prepared for the Government to the farmer or rancher, and that, at about that time, he also mailed or gave the farmer or rancher the other invoice showing a discount (Tp. 140-141, 172, 210, 383-384). The Government witness, Mr. Cornell, testified that the forms (ACP-245 and ACP-250), which contained Mead's inflated cost figures, were signed by the farmer or rancher after completion of the practice (Tp. 47, 61, 80, 86). And the district court found that the farmers and ranchers understood that part of the total cost of the conservation work was to be born by them (Finding 15); and that Mead sent to the farmers and ranchers a separate invoice reflecting the fact that they were receiving a "discount" and paying "less than * * * [their] proportionate share of the total cost of the work" performed by Mead (Findings 17-18) (Tr. 103-104). On this record, we submit that the only reasonable inference is that the other defendants-appellees were fully aware that the applications filed by them constituted false claims upon or against the United States, and that they, too, are liable to the United States for statutory forfeitures and double damages under the False Claims Act. See United States v. National Wholesalers, 236 F. 2d 944, 950 (C.A. 9), certiorari denied, 353 U.S. 930. ^{23/}

^{23/} As in the case of defendant-appellee Mead, the district court also improperly rejected the Government's claim against the other defendants-appellees for payments made by mistake.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

WILLIAM M. BYRNE, Jr.,
United States Attorney,

JOHN C. ELDRIDGE,
HOWARD J. KASHNER,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

MARCH 1968

CERTIFICATE

I certify that, in connection with the preparation of the brief and appendix, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief and appendix is in full compliance with those rules.

Leonard Schaitman
LEONARD SCHAITMAN
Attorney,
Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA }
CITY OF WASHINGTON } ss.

LEONARD SCHAITMAN, being duly sworn, deposes and says:

That on March 27, 1968, he caused one copy of the foregoing Brief and Appendix for the United States to be served by air mail, postage prepaid, upon counsel for appellees:

David D. Kinley, Esquire
300 West 3rd Street
Post Office Box 312
Oxnard, California 93003

William L. Boyes, Esquire
2185 Ventura Boulevard
Camarillo, California 93010

Paul B. Noel, Esquire
60 Olson Road
Thousand Oaks, California 91360

Carl A. Stutsman, Jr., Esquire
445 South Figueroa Street
Los Angeles, California 90017

Leonard Schaitman
LEONARD SCHAITMAN
Attorney,
Department of Justice,
Washington, D. C. 20530.

Subscribed and Sworn to before
me this 27th day of March, 1968.

Angeline Johns
NOTARY PUBLIC

My Commission expires April 14, 1972.

A P P E N D I X

APPENDIX PURSUANT TO RULE 18--2(f) OF THE COURT'S RULES

Pursuant to Rule 18--2(f) of the Court's rules, the following is a table of page references to the record where the various exhibits were identified, offered, and received in evidence or rejected:

<u>EXHIBIT</u>	<u>IDENTIFIED</u>	<u>OFFERED</u>	<u>RECEIVED OR REJECTED</u>
Plaintiff's:			
1-74, 77-78, 81-83	Tp. 24	Tp. 24-26	Tp. 24-26
42-A	Tp. 146	Tp. 147	
51-A	Tp. 169	Tp. 172	Tp. 172*
75-76	Tp. 24	Tp. 24-26, 411	Tp. 24-26, 411
79	Tp. 24	Tp. 290	Tp. 290
80	Tp. 24	Tp. 278	Tp. 279A
84	Tp. 230		
85	Tp. 339	Tp. 343, 351	Tp. 362
86-88	Tp. 339	Tp. 343	Tp. 343

* Admitted against Mead only.

Defendants':

C-A	Tp. 389	Tp. 393	Tp. 394
C-B	Tp. 389	Tp. 393	Tp. 394
C-C	Tp. 389	Tp. 393	Tp. 394
J-B	Tp. 214	Tp. 225	Tp. 225
Q-B	Tp. 213	Tp. 225	Tp. 225
QJ-A	Tp. 213	Tp. 214	Tp. 214
QJ-B	Tp. 411-412	Tp. 412	Tp. 412
S-A	Tp. 181		
S-B	Tp. 371, 413	Tp. 372, 413	Tp. 372, 413

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No. 22,180

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

LENNARD L. MEAD; ALBERT CHUNN; A. V. HOHN;
RICHARD QUINE; ALDEN JOHNSON; VIOLET MEAD;
and RAY R. SENCE,

Appellees.

On Appeal From the United States District Court for the
Central District of California.

BRIEF FOR APPELLEES.

PRELIMINARY STATEMENT.

This brief is filed on behalf of all of the appellees.

The appellant, United States of America, commenced the instant action against appellees by filing its complaint on July 1, 1964. In said complaint, appellant asserted claims against each of the named defendants based upon three alternate theories of recovery: (1) statutory forfeitures and double damages for alleged violations of the False Claims Act (Title 31, U.S.C. §231); (2) payment by mistake; and (3) administra-

tive claims by the Agricultural Stabilization and Conservation Committee. [Tr. 2.]¹

The United States District Court for the Central District of California (Peirson M. Hall, Judge) entered judgment denying appellant's claims as against each of the defendants. [Tr. 108.] Appellant's appeal from that judgment is limited to its alleged right to recover under the False Claims Act or, alternatively, for alleged payments by mistake. Appellant expressly abandoned its administrative claims theory. (Brief pp. 1, 5.)

STATEMENT OF THE CASE.

In 1957, 1958, and 1959, the United States Department of Agriculture administered an agricultural conservation program pursuant to the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590a-590q. Pursuant to this program, the United States shared with farmers and ranchers located in the continental United States the cost of constructing approved soil and water conservation dams, diversion ditches, and similar structures. [Tr. 101-102.]

Defendant and appellee, Lennard L. Mead (herein called Mead), was an approved contractor for the conservation program in Ventura County during the years in question. Each of the other defendants was either an owner or lessee in charge of parcels of land in Ventura County on which Mead constructed conservation projects. [Tr. 102.]

¹The designation "Tr." as used herein refers to the Transcript of Record. The designation "Rep." refers to the Reporter's Transcript of Proceedings.

A. Procedure for Conservation Practices.

In pursuance of the conservation program, the Department of Agriculture developed a number of forms for use in obtaining approval of conservation projects or "practices" for federal cost sharing.² A project may be initiated by the filing of a Request for ACP Cost-Sharing (Form ACP-201) with the appropriate County Agricultural Stabilization and Conservation Committee in charge of approving and administering programs within the County. [Tr. 102.] The proposed project is then referred to the Soil Conservation Service, an agency of the United States Department of Agriculture, for technical work. [Rep. 27; Tr. 102.]

After completion of an approved project, the farmer files an application for payment on Form ACP-245 with the County Committee for the government's share of the costs. If the farmer also executes a form ACP-250, Purchase Order for Conservation Materials and Services, the contractor receives the federal cost-share payment directly. [Tr. 101-103; Rep. 26-43.]

The Form ACP-245, application for payment, shows the number of units of work and materials performed and supplied for each practice, and the government's approved cost share. [See, *e.g.*, Ex. 59.] The Form ACP-250, purchase order authorizing payment of the federal cost share directly to the contractor, shows the number of authorized units furnished, the "Fair Price

²Projects under the conservation program are generally referred to as "practices," as shown in the government's brief and much of the documentation in the record.

or Sales Price" per unit, the "Total Maximum Cost," "Maximum Payment By Government" and "Maximum Payment By Farmer." The Form ACP-250, also contains a certification by the farmer "that the price paid to the vendor does not exceed the difference between the fair price, if applicable, and the payment by the Government." [See, *e.g.*, Exs. 57, 58, 60.]

Although the farmer's signature is required on the various forms, in practice they are filled out by the County A.S.C. Committee, Soil Conservation Service and contractor. The farmer merely signs them. [Rep. 28-48; Tr. 103.]

B. The Facts in the Instant Case.

In the instant case, Mead, himself a farmer, approached the other farmers and ranchers to encourage them to adopt soil conservation practices. Mead was approved as a contractor by the Department of Agriculture. In some instances, because the farmers could not afford payment in cash, he agreed to accept payment in services or in property other than money. In other cases, where he "thought that it warranted the extreme," he simply gave a "discount." [Rep. 110-111; Tr. 102-104.]

Mead, having only limited education, relied on Eldridge Cornell, of the Ventura County A.S.C. Committee, for assistance in the preparation of the various forms which were presented to the farmers for signature and filed with the governing agencies. [Rep. 26, 376-377.] The information entered in the forms was supplied by the County Committee, the Soil Conservation Service and Mead. The farmers merely signed the forms presented to them—in many cases, while the

forms were still incomplete and without looking at them closely or understanding them fully. [Tr. 103; Rep. 46-47, 228, 285, 290, 369-370.] Some of the documents were signed by employees of the farmers rather than the farmers themselves. [Rep. 247, 253; Exs. 17, 28, 29, 33, 56.]

Mead regarded the terms "cost" and "price," used in the various documents, as being synonymous. In preparing the invoices which he submitted to the government in support of the applications for payment, he computed the cost in terms of the work actually performed at the "fair price" he quoted, which he believed the "true cost" of the project. In each instance, he believed that the government was receiving "its money's worth," regardless of the arrangement he made with the particular farmer as to the farmer's share. [Rep. 130-132, 142-143, 152-153, 156, 382-383.]

The facts relating to Mead's transactions with each individual defendant are as follows:

1. A. V. Hohn.

Mead constructed three soil conservation projects on the property of defendant A. V. Hohn in the years 1957, 1958, 1959 respectively. In 1957, Mead constructed an erosion control dam on Hohn's property. On April 30, 1957, an application for payment and invoice prepared by Mead were submitted to the County A.S.C. Committee showing a cost of \$2,014 for the project. The documents which required the farmer's signature for this practice were signed by Hohn's foreman. Hohn did not live on the property himself. Mead received the sum of \$1,500 as payment of the

government's share of the cost. [Exs. 17-22; Rep. 247.]³

In 1958, another dam was constructed on Hohn's premises. On February 20, 1958, an application for payment and invoice prepared by Mead were submitted to the County Committee showing a cost of \$2,580 for the project. Mead received from the government a cost share in the sum of \$2,064. [Exs. 23-27.]⁴

In 1959, a third conservation practice was constructed on Hohn's property by Mead. The government forms (Forms ACP-245 and 250) were signed by the wife of Hohn's foreman. An application for payment and invoice prepared by Mead were submitted to the County Committee on March 27, 1959. The price or cost of the project indicated in such documents was \$1,377. The government paid Mead a cost share of \$804.50. [Exs. 28-36; Rep. 253.]

Mead received no cash from Hohn for any of these projects. However, Hohn's foreman contributed labor and equipment owned by Hohn; he drove a tractor and ripper for several hours a day assisting Mead with construction. [Rep. 119, 132-133, 248, 258-259.] Hohn also gave Mead a trailer valued at approximately \$1,000, three sheep and the use of a pasture for his cattle. [Rep. 134, 136, 248-249, 257-258.]

³The Complaint in this action was filed on July 1, 1964, more than six years after the filing of the alleged false claims connected with this project. [Tr. 2.] Accordingly, the government's suit against Mead and Hohn on this count is barred by the statute of limitations. 31 U.S.C. §235. Appellant's brief concedes that the statute of limitations "may have run" with respect to some of its claims, but does not identify them. (Brief, p. 5, n. 6.)

⁴The alleged violations of the False Claims Act with respect to this project are barred by the statute of limitations. See footnote 3, *supra*.

There was no understanding between Hohn and Mead that Mead was to do the work for only a federal cost share. Hohn was always to contribute something of value. [Rep. 250.] Hohn did not want to put any cash into the projects but told Mead to take what he could use as compensation, which was agreeable to Mead. [Rep. 134.] Hohn believed that the various items of property and services contributed on his behalf satisfied his indebtedness. [Rep. 259.]

Mead was referred to a document he had signed (but had not prepared) in connection with the government's investigation in this matter in which he allegedly stated that he gave Hohn invoices showing cash "discounts," which invoices were different from those Mead submitted to the government. [Ex. 81; Rep. 118-119.] But Mead testified only that it was his "general practice" to send such invoices to the farmer; he could not recall specifically that he sent them to Hohn and no copies were produced. [Rep. 138-141.] Hohn testified that he did not recall seeing any invoices. [Rep. 255.]

2. Violet Mead and Gale B. Graham.

In 1958, Mead constructed a soil conservation project on the property of his mother, defendant Violet Mead. An application for payment was filed with the County A.S.C. Committee on May 6, 1958. Such application, together with Mead's invoice, showed a cost of \$2,888. The government paid Mead a cost share of \$2,175. [Exs. 71-73A.] Mead was supporting his mother and did not collect any money from her for the project. [Rep. 187.]

Also in 1958, Mead constructed a soil conservation practice for Gale B. Graham on the Henderson Ranch.

The application for payment was filed May 8, 1958, supported by Mead's invoice. The cost was \$3,268. The government paid Mead \$2,500. [Exs. 67-70.] Mead testified that Graham and the Henderson Ranch people would not contribute anything except the land on which the dam was constructed. [Rep. 202.]⁵

3. Richard Quine.

In 1959, Mead suggested to defendant Richard Quine that he avail himself of the soil conservation program by having an erosion control dam and diversion ditch constructed on his property. Quine told Mead that his budget would not allow him to pay more than \$500 for such a project. Mead agreed to do the work and accept \$500 as Quine's share. [Rep. 141-142, 265-268.]

On April 12, 1959, an application for payment and invoice prepared by Mead were filed with the County A.S.C. Committee showing a cost or price of \$3,956.09. The government paid Mead the sum of \$2,389.80. [Exs. 37-44.] Quine paid Mead \$500 as agreed. [Rep. 219-221.]

Quine testified that Mead did not show him any statement or bill showing the total cost reported to the government. [Rep. 276.] Mead produced an invoice which he said he prepared for Quine showing a "discount" [Ex. 42-A], but there was no evidence that he sent it to Quine. He still had the original in his file and could not swear that he sent a copy to Quine. [Rep. 146-149, 363.] Quine testified that he never saw such

⁵Appellant's trial counsel stated that Graham was not made a defendant in part because of the statute of limitations. [Rep. 417-418.] Actually, the statute of limitations had expired as to all of the alleged false claims arising out of the projects for both Graham and Violet Mead. See footnote 3, *supra*.

invoice before nor did he see the invoice which Mead submitted to the government [Ex. 42]. [Rep. 264].

4. Alden Johnson.

In 1959, Mead approached defendant Alden Johnson and told him his ranch was approved for soil conservation work and asked if he would care to go along with it. Johnson said he would if his share of the work could be done for approximately \$300, which was his "budget." Johnson did not have any discussion with Mead concerning the government's share of the cost, nor did he recall getting any estimate from Mead as to the total cost of the project. [Rep. 221, 282.]

When Mead presented the various government forms to Johnson for his signature, Johnson did not read the "fine print." He was not familiar with the soil conservation program and assumed everything was proper when he signed them. [Rep. 282-285.]

On April 12, 1959, an application for payment and invoice prepared by Mead were submitted to the County A.S.C. Committee showing a cost or price of \$1,849.75. The government paid Mead the sum of \$1,156.90. [Exs. 46-55.] Johnson paid Mead the sum of \$317.40. [Rep. 219.]

Mead's invoice [Ex. 51] to the government represented Mead's full price or cost computed on a fair-hourly rate for the work he actually performed. He accepted from Johnson what he could get and treated the rest as a "discount." [Rep. 156, 159, 174; Tr. 103, 105.] Mead produced a document which he kept for his own records showing the "discount" to Johnson [Ex. 51-A], but could not say that he gave Johnson a copy. [Rep. 170-173.] Johnson testified that he had no dis-

cussions with Mead concerning any discount and did not recall seeing any invoices prepared by Mead. [Rep. 289-290.]

5. Albert Chunn.

In 1959, Mead contacted defendant, Albert Chunn, concerning the construction of an erosion control dam on Chunn's property. On June 18, 1959, an application for payment and invoice prepared by Mead were submitted to the County A.S.C. Committee. The quoted price or cost was \$4,464. The government paid Mead \$2,500 for the project. [Exs. 1-16.]

Mead and Chunn agreed that since Chunn could not pay any cash, he would furnish services and equipment to assist in the construction of the dam and would permit Mead to use a large pasture to graze his cattle. Among other things, Chunn contributed a tractor which he operated himself and a sprinkler system. He pumped water for the sprinkler system and built several small ponds to supply it. Although Chunn and Mead had no specific agreement as to the value of Chunn's services and the grazing rights, they both recognized Chunn's contribution as having considerable value. [Rep. 112, 115, 232, 395-399, 408.]

Both Mead and Chunn testified that the approximate value of Mead's use of Chunn's pasture was \$600. [Rep. 112, 232.] Mead stated in the statement he signed in connection with the government's investigation [Ex. 81] that he put a value of \$665 on the work performed by Chunn. But he admitted at the trial that he could not really price Chunn's work [Rep. 113]; that he did not keep any records and his figure was only an estimate [Rep. 209]; and that he had only considered

Chunn's tractor work without taking into consideration the sprinkler system. [Rep. 126-127.] Chunn himself testified that the figure of \$665 was not the fair value of his contribution to the practice. [Rep. 232.] He offered evidence in some detail as to the extent of his services at a significantly greater total value than Mead's estimate. [Rep. 395-399; Exs. C-D.]

As with several of the other farmers, Mead said he thought he had made up an invoice for Chunn showing a cash discount. [Rep. 116-117.] But none could be found and he was not sure. [Rep. 207-208.] Chunn testified that he did not receive any such invoice and never had any discussion with Mead about a discount. Chunn saw Mead's invoice to the government (which did not show a discount) but only after he had signed the purchase order applying for payment. [Rep. 227-228, 232-233.]

6. Ray R. Sence.

In 1959, Mead constructed a mechanical outlet on the property of defendant Ray R. Sence to replace a prior soil conservation project which had been washed out. Sence had paid his full share of the original project in cash and Mead testified that he felt "morally obligated" to undertake the corrective venture. Accordingly, it was agreed that Sence would only have to pay \$800 for the second project, which sum, in part, was to be applied to the purchase of needed materials. Sence had no discussion with Mead about the total cost or the amount of the government's share. [Rep. 175-177, 291-292, 295-297.]

On March 30, 1959, an application for payment and an invoice prepared by Mead were submitted to the County A.S.C. Committee. The price or cost stated for

the project was \$4,314.35. The government paid Mead \$2,500. Sence purchased materials used in the project for which he paid \$627.59; and he paid Mead \$172.41 in cash to make up his agreed \$800 share. [Exs. 56-62; Rep. 183, 296.]

Contrary to the government's contention, Mead did not testify that he mailed Sence an invoice showing a "discount." (Brief, p. 9.) As we read the record, Mead was talking about the invoice to the government [Ex. 60] when he said he was sure he made a "similar invoice to Mr. Sence," which "must have been mailed." [Rep. 183.] He did not state that he gave Mead an invoice showing a "discount." Sence testified, however, that he did not see the invoice Mead presented to the government. [Rep. 294.]

C. The District Court's Decision.

The District Court held that appellant was not entitled to recover any amount from any of the defendants. It concluded that none of the defendants had filed a false claim within the meaning of 31 U.S.C. §231; that no payments by the United States were made under mistake; and that there was no administrative determination which would serve as a basis for recovery against any of the defendants. [Tr. 106.]

In support of this decision, the Court entered Findings of Fact which included the following:

"14. In no instance in this case was the information submitted on Forms ACP-245 or ACP-250

by any of the defendants incorrect or false insofar as reflected a price per unit of the work to be performed other than the actual price or an amount of units other than the number of units of such work actually performed and on which reimbursement was to be based."

"21. Based upon the Forms ACP-245 and ACP-250 introduced in this case, an agreed percentage of the total cost, as properly reflected thereon and properly chargeable to the United States of America was paid on behalf of the respective landowners.

22. In no instance has it been shown herein that any payment actually made by the United States pursuant to said forms was in excess of the fair market value of the work done on behalf of the farm owner and pursuant to the Agricultural Soil Conservation Program or in excess of the fair value of the United States' agreed share of the cost.

23. In no instance was the actual value of the work done shown to be less than the value represented by the defendant Mead.

24. During the years in question, and also pursuant to the Soil Conservation and Domestic Allotment Act, 16 U.S.C. 590g (a) to 590q (b), there existed a California State Agricultural Stabilization and Conservation Committee charged with the duty of administering the agricultural stabilization program throughout the State of California.

25. Pursuant to an investigation by certain offices of the United States Department of Agricul-

ture, said Committee was apprised, and subsequently informed the individual defendant landowners and the defendant Mead in the pending case, that charges had been filed against them involving an alleged violation of the Soil Conservation Act, and apprising them of an opportunity to have a hearing on these charges at the offices of said State Committee in Berkeley, California.

26. Subsequently, as shown by the official Minutes of said Committee, a recommendation of the Committee was made in the case of all defendants but Mead that no further action be taken against any of the defendants in this action, either civil or criminal. In the case of the defendant Mead, no recommendation either for or against such action was made.

27. No determination was made by said State Committee on any administrative claim which in any way constituted an administrative finding or determination of any violation of the statute herein sued upon." [Tr. 103, 105-106.]

QUESTIONS PRESENTED.

1. Did the District Court correctly hold that appellant is not entitled to recover from any of the defendants under the False Claims Act. (31 U.S.C. §231, *et seq.*)

2. Did the District Court correctly hold that appellant is not entitled to recover from any of the defendants by reason of any alleged payment by mistake.

SUMMARY OF ARGUMENT.

The evidence fully supports the District Court's findings that none of the defendants were guilty of filing false claims within the meaning of the False Claims Act.

In the first place, appellant did not sustain its burden of proving that documents filed by any of the defendants were false. Appellant argues that the statements as to the total "cost" of each practice were incorrect because Mead actually received less. But the government forms themselves do not contain any statement that could be interpreted as a representation that the contractor in fact received a specified sum. Indeed, the references in the documents to "fair price or sales price" and "maximum cost" would seem to at least impliedly permit the contractor to base his claim for government cost sharing on his normal price, even though he in fact does not collect that much because of the farmer's inability or unwillingness to pay the difference. The government is not hurt in any way if the contractor is forced to accept something less from the farmer so long as his quoted price is fair and he actually does the work. In such case, as the District Court found here, the government receives full value for its cost-share payment.

Secondly, even if the claims were regarded as being technically false or incorrect as appellant contends, that alone would not be sufficient to establish appellant's case. It must also be shown that the defendants had

knowledge of the falsity and sought to receive from the government something to which they knew they were not entitled. A fraudulent intent to deceive the government is required to constitute a violation of the False Claims Act. Certainly, appellant failed to sustain its burden of proving that any of the defendants had the requisite *scienter*. On the contrary, the evidence overwhelmingly established that any incorrectness in the claims was the result of innocent misunderstanding and none of defendants had knowledge of any error.

Finally, it was shown that in some instances Mead did in fact receive the full price or cost he quoted, the farmer's share being paid in services or property. In other instances, the government's claims are barred by the statute of limitations.

Thus, the District Court correctly concluded, as the evidence required, that appellant was not entitled to recover from any of the defendants under the False Claims Act and did not make any payments by mistake.

ARGUMENT.

I.

THE DISTRICT COURT CORRECTLY HELD THAT DEFENDANTS DID NOT VIOLATE THE FALSE CLAIMS ACT.

It is true, as suggested in appellant's brief, that the purpose of the False Claims Act is to protect the funds and property of the government from "fraudulent claims"; and that a "claim" within the meaning of the act includes within its scope "all fraudulent attempts to cause the Government to pay out sums of money." (Brief pp. 21-22.) Of course, appellees do not deny that the various documents filed with the governing agencies in the instant case constitute "claims" within the meaning of the statute. Appellees do insist, however, that such claims were not "false." The law is abundantly clear that in determining that issue the statute must be strictly construed because it is penal in nature. *Rainwater v. United States*, 356 U.S. 590 (1958); *United States v. McNinch*, 356 U.S. 595 (1958); *United States ex rel. Brensilber v. Bausch & Lomb*, 131 F. 2d 545 (2d Cir. 1942); *Cahill v. Curtis-Wright Corp.*, 57 F. Supp. 614 (W.D. Ky. 1944.)

In the instant case, the District Court held that the claims in question were not false. It is apparent that appellant contends this was error on the theory that Mead did not actually receive the entire "cost" shown in the documents because some of the farmers did not pay the full difference between the government cost-share and the total cost reported. But the amounts required to be stated in the government's own forms were framed in terms of "fair price or sales price" and "maximum cost." (See Form ACP-250.) None of

the forms required the contractor or the farmer to represent that the entire "fair price" or "maximum cost" was actually paid. The farmer was only asked to certify that the price paid to the vendor did not exceed the difference between the fair price and the payment by the government. Appellant does not contend that this certification was false in any of the subject transactions.⁶

The District Court found that in every instance the quoted price was fair and represented the fair market value of the work actually performed; and hence, that the government received full value for its cost share based upon such price. Accordingly, there was nothing in the government forms which was false or incorrect. [Finds. 14, 22-23, Tr. 103, 105.]

In attacking these findings, appellant misses the point of the District Court's holding. The decision was not based solely upon the Court's conclusion that the government was not damaged, as appellant suggests. (Brief p. 24.) The findings concerning fair price and value bear directly upon the issue of whether the claims were "false." The price quoted was fair, the work was actually performed and the government got its money's worth because the value of the projects was at least equal to the quoted price. In other words, the government paid no more than its proper percentage of the fair price and reasonable cost of the project. Since this was all that the government's forms seemed to require, the court was entirely justified in its finding that the claims based thereon were not false.

⁶Indeed, in most cases the farmer's payment to Mead was *less* than the difference between the fair price and the payment by the government. Mead himself bore the loss.

Appellant contends that the court's findings as to value were based upon "self-serving testimony." (Brief p. 25.) But that was merely a factor for the trier of fact to take into consideration for purposes of credibility. It is significant that all of the projects were approved by the government at the quoted price per unit and the government offered no evidence whatever that such price was unfair or unreasonable. The government's witness who administered the program could not dispute that the prices were fair and admitted they "very well could have been." [Rep. 96-100.] Under such circumstances, there would be no basis for this Court to say that the District Court's findings were "clearly erroneous" and they must be accepted on appeal. Fed. Rules Civ. Proc. 52(a); *Earle v. W. J. Jones & Son*, 200 F. 2d 846 (9th Cir. 1952).

Appellant also seeks to explain that the "fair price or sales price" language in the government's forms was placed there during war time solely to insure that the contractor did not receive excessive profits. (Brief p. 24.) Of course, no evidence to that effect was offered—and it would be immaterial in any event. It cannot be denied that the forms contained such language and could easily lead a farmer or contractor to assume that the government cost-share was based on "fair price" rather than the total compensation received by the contractor. If the "fair price" wording had no relevance or needed further explanation or qualification, it was up to the government to modify its forms. Having failed to do so, it is manifestly unfair to now contend that the claims were "false" because defendants may have misinterpreted such ambiguous language.

Appellant appears to recognize the weakness of resting its position on the government forms and repeat-

edly emphasizes the *invoices* prepared by Mead himself. Appellant argues that the invoices were “inflated” because they stated a total cost in excess of the amount Mead actually received. But Mead’s invoices were obviously prepared in conjunction with the government’s forms which they were intended to support. Mead’s computations of cost in the invoices were derived from the “fair price” and number of units of work reported in the government forms. The invoices did not state that Mead actually received payment of the entire sum indicated. In other words, the invoices merely reflected the same figures that were reported in the various printed documents supplied by the government, based on the “fair price” language, and were no more “false” than the forms themselves.

For the foregoing reasons, it is submitted that the claims under scrutiny were not false or incorrect as appellant contends. If the government was misled in computing the respective cost-shares, it is not because of any false information supplied by Mead or any of the other defendants. The documents they submitted were filled out in accordance with their honest understanding of what was required and the trial court found that the information supplied was entirely true. In view of the strict construction required of the False Claims Act, the ambiguous language of the subject documents and the uncontradicted testimony in the record, it is submitted such findings cannot be held to be “clearly erroneous” under Federal Rule of Civil Procedure 52(a).

Appellant argues, nonetheless, that the invoices must be regarded as technically incorrect as a matter of law, because the soil conservation cost-sharing regulations contemplated that the farmer would in fact pay the

entire difference between the quoted cost and the government's payment. The evidence, of course, is that Mead did not so understand. There is no evidence that he even knew of the existence of such regulations. He testified, in substance, that he believed his invoices, based on his quoted price, represented the "true cost" of the projects; that he understood he was supposed to report the full "true cost" to the government in the invoices; and that the payment he was entitled to receive from the government was based on that cost. [Rep. 152-153; See also, Rep. 130, 132, 142, 156, 158-159.]

At the trial, in apparent recognition of the uncontradicted evidence, appellant's counsel urged that Mead's allegedly technically incorrect invoices fell within the False Claims Act even though Mead "may not have intended to defraud anybody." [Rep. 318.] Moreover, it was contended that the other defendants were equally guilty because they gave Mead "implied authority to act on their behalf" and hence were bound by his "false" invoices. [Rep. 425-427.]

This position was, and is, unquestionably contrary to law. It is not enough for the government to show that a claim is incorrect. It must also be shown that the defendant *knew* the claim was false and *intended to defraud* the government. These elements of guilty knowledge and fraudulent intent are expressly incorporated into Section 231 of Title 31 of the United States Code. Hence, the courts have repeatedly held that a specific intent to deceive is a prerequisite—a *sine qua non*—to liability under the Act. Moreover, the government has the burden of proving such elements by clear and convincing evidence. *United States*

v. National Wholesalers, 236 F. 2d 944 (9th Cir. 1956), cert. den. 353 U.S. 930; *United States ex rel. Brensilber v. Bauch & Lomb Optical Co.*, 131 F. 2d 545 (2d Cir. 1942); *United States v. Robbins*, 207 F. Supp. 799 (D. Kans. 1962); *United States v. Schmidt*, 204 F. Supp. 540 (E.D. Wis. 1962); *United States v. Park Motors*, 107 F. Supp. 168 (E.D. Tenn. 1952); *Cahill v. Curtiss-Wright Corp.*, 57 F. Supp. 614 (W.D. Ky. 1944).

The law is accurately summarized on pages 54-55 of the Opinion of the United States District Court in *Woodbury v. United States*, 232 F. Supp. 49 (D. Ore. 1964), affirmed in part and reversed in part on other grounds, 359 F. 2d 370 (9th Cir. 1966), as follows:

"In an action under the False Claims Act, the United States must prove that there was a false representation of a material fact made with knowledge of its falsity, which false representation must be believed and acted upon by the United States. *United States v. Robbins* (D.C. Kan. 1962) 207 F.Supp. 799, 807. The proof by the Government must be by clear, explicit and unequivocal evidence. *Proctor v. Sagamore Big Game Club*, 265 F.2d 196, 202 (3 Cir. 1959); *Hablas v. Armour and Co.*, 270 F.2d 71, 77 (8 Cir. 1959). Although some authorities support the view that an intent to defraud is not an element of an action under the Act, *United States v. Toepleman* (E.D.N.C. 1956), 141 F.Supp. 677, the better reasoned cases support the view that such intent is necessary. *United States v. National Wholesalers*, 236 F.2d 944, 950 (9 Cir. 1956), cert. den. 353 U.S. 930, 77 S.Ct. 719, 1 L.Ed.2d 724; *United States v.*

Schmidt (E.D. Wis. 1962) 204 F.Supp. 540, 543, 544. *The mere showing that a person has signed a false or incorrect statement and presented it for payment is not, in itself, sufficient to hold such person liable under the False Claims statute. The Government must go beyond that and show that the person intended that the signing would procure from the Government something to which the person knew he was not entitled. Proof must be had that such person intended, as a result of the signing of the statements, to defraud the Government. United States v. Park Motors* (E.D. Tenn. 1952) 107 F.Supp. 168, 176.” (Emphasis added.)

It appears from the government’s brief on appeal that it now recognizes it had the obligation to prove the requisite fraudulent intent. However, with almost total disregard for the evidence and the trial court’s findings, appellant cavalierly assumes that such burden was met.

With respect to Mead, appellant states that the evidence and findings demonstrate conclusively his “invoices intentionally overstated [his] actual charges.” (Brief, p. 22.) Appellant further presumes that such “overstatement” was for the fraudulent purpose of obtaining payments Mead knew he was not entitled to. This constitutes a gross distortion of the record and findings. Appellant uses the terms “charges” and “cost” as the equivalent of payment actually received. But the evidence discussed previously shows that Mead did not purport to represent to the government the amount he actually *received* from the farmers, but rather the total “fair price” or “true cost” for the project.

So far as he was concerned, if he received anything less than this true cost, it was a personal gratuity or "discount" coming out of his own profit. Even if he was incorrect in this belief, and submitted erroneous invoices under the regulations because he did not disclose the discount, his testimony is that he did not know he was wrong or that he was not entitled to as much as he received from the government.⁷

As for the other defendants, appellant argues they must have known the claims were false because of Mead's invoices. But most of them testified that they did not even see the invoices. Nor is there any reason to assume they would have known anything was improper about them if they did see them. None of these men had any real knowledge or understanding of the soil conservation program or the various documents they signed. The documents were filled out by Mead and the various government officials and the farmers simply assumed they knew what they were doing. Even if it could be said that they were careless or negligent, that would not provide the requisite fraudulent intent for liability under the False Claims Act.

In addition to the invoices which Mead submitted to the government showing the same figures set forth in the government's printed forms, there was a great deal of discussion during the trial about some so-called "second invoices." These were allegedly given to the farmers by Mead showing "discounts" on each farmer's

⁷Appellees know of no authority which precludes the contractor from reducing his profit in this fashion. In fact in some cases he may have no choice—as where the farmer simply refuses or is unable to pay his share. Is the contractor in such case required to take a further loss on the transaction by giving the government back part of its share?

share of the cost. Appellant relies on the trial court's finding that some such invoices were sent (without specifying which farmers received them) and argues the farmers should have known from them that the government was paying more than its proper share. No such inference can be drawn and the trial court refused to do so. [Finds. 17-20, Tr. 104.] All of the farmers testified that they had no discussions or knowledge as to how much the government would pay. There is no evidence any of them had any knowledge of how the government's share was to be computed. Hence, the fact that their own share was shown as a discount would have no particular significance to them so far as the government's share was concerned.⁸

It should also be borne in mind that two of the appellees, Hohn and Chunn, paid for their shares of the respective projects with services and property. (See statement of facts, *supra*.) The government's witness agreed that this practice is permissible [Rep. 51], and appellant does not contend otherwise. In effect, appellant merely argues about the value to be assigned to such compensation. Although the parties themselves had no specific agreement as to such value, they plainly intended and believed that Hohn and Chunn were con-

⁸Furthermore, the testimony cited and discussed *supra*, in the statement of facts, shows that the farmers denied ever receiving any invoices showing discounts; and Mead himself admitted he could not prove he sent them and was not entirely sure which farmers, if any, were supposed to have received them. The court itself commented that there was no evidence the invoices were ever seen by anyone but Mead. [Rep. 315, 363.] Obviously, the finding that these invoices were sent is contrary to all of the evidence and the court's own observation to that effect. In truth, it is simply the result of a misunderstanding on the part of counsel who prepared the findings for the court, which the court inadvertently overlooked.

tributing the equivalent of their full share. It may be reasonably inferred from their testimony and the findings that the District Court concluded these defendants did pay in full, and Mead's invoices were not "inflated" or technically incorrect as to them under even the government's theory of the case.

As for the three appellees who paid an agreed amount, Sence, Quine and Johnson, the evidence is that so far as they knew they had no further obligation. Nor did they know that any representations were being made to the government which were in any way untrue or misleading as to how much they were contributing.⁹

To sum up, it is submitted that there is simply no basis in fact or in law upon which the District Court's judgment may be reversed. In accordance with the law, the court construed the statute strictly and found that the government failed to meet its burden of proving the claims in question were false. The language used in the forms themselves and the complete lack of knowledge of any impropriety on the part of all defendants compelled the conclusion that the claims were not false within the meaning of the Act. Even if Mead's invoices were technically inaccurate or misleading, the court found, at least implicitly if not explicitly, that none of the defendants knew of the errors, or had any intention to deceive the government or fraudulently obtain payments which defendants knew they were not entitled to.

⁹The only transactions in which the farmers did not contribute anything at all were those involving Grahm, who is not a defendant, and Mead's mother, Violet Mead. As pointed out in footnotes 3, 4 and 5, *supra*, these claims are barred by the statute of limitations, along with one of the claims against Hohn.

This determination, particularly as to the issue of intent, is one of fact; it was for the trier of fact to judge the credibility of the witnesses and to draw inferences from the evidence. Fed. Rules Civ. Proc. 52-(a); *Earle v. W. J. Jones & Son*, 200 F. 2d 846 (9th Cir. 1952). Having done so, with ample evidence to support the findings and conclusions, the decision is not clearly erroneous or contrary to law and must be affirmed.

II.

THE DISTRICT COURT CORRECTLY HELD THAT APPELLANT WAS NOT ENTITLED TO ANY RECOVERY FOR ALLEGED PAYMENT BY MISTAKE.

Appellant also urges that it is entitled to recovery under the theory that the government made overpayments by mistake. The preceding discussion shows that the District Court found from the evidence that there were in fact no overpayments. The government got its full money's worth in each instance.

Appellant argues that it need not be damaged to recover under the False Claims Act. That may be true, but appellees know of no legal theory by which appellant is entitled to recover for an alleged overpayment by mistake when it has not been damaged and received full value for its payment. Does appellant mean to suggest that it may recover back some portion of the payments to Mead because of its technical interpretation of the soil conservation regulations, even though in fact it got its money's worth and the difference came out of Mead's profit? Surely so unjust a result can not be the law, as is demonstrated by appellant's lack of any citation of authority on this point.

Lastly, appellees can conceive of no theory under which any of the farmers could be held liable for this cause of action. They received no payments and did not make or cause any mistake. Appellant does not even advance an argument or explanation to support its contention that the District Court's decision was in error on this question.

CONCLUSION.

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

HILL, FARRER & BURRILL,
CARL A. STUTSMAN, JR.,
JACK R. WHITE,
PAUL B. NOEL,

DURLEY, TODD, CEARNAL,
MARSHALL & CALLENDER,
WILLIAM L. CALLENDER,
WILLIAM L. BOYES,

Attorneys for Appellees.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JACK R. WHITE,

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

LENNARD L. MEAD; ALBERT CHUNN; A. V. HOHN;
RICHARD QUINE; ALDEN JOHNSON; VIOLET
MEAD; and RAY R. SENCE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

WILLIAM M. BYRNE, Jr.,
United States Attorney,

JOHN C. ELDRIDGE,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22,180

UNITED STATES OF AMERICA,

Appellant,

v.

LENNARD L. MEAD; ALBERT CHUNN; A. V. HOHN;
RICHARD QUINE; ALDEN JOHNSON; VIOLET
MEAD; and RAY R. SENCE,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES

I. THE FALSE CLAIMS ACT AND MISTAKE CLAIMS
AGAINST DEFENDANT-APPELLEE LENNARD L. MEAD

A. THE FALSE CLAIMS ACT VIOLATIONS

1. The False Claims Act is broadly phrased to reach any person who makes or causes to be made "any claim upon or against" the United States, "knowing such claim to be false, fictitious, or fraudulent * * *," or who knowingly makes or causes to be made a false "bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" for the purpose of "obtaining or aiding to obtain the payment or approval" of such claim. R.S. § 5438(1878). There can be no doubt that defendant-appellee Lennard L. Mead (hereafter "Mead") violated

these provisions of the Act, for, as shown in our main brief (pp. 21 et seq.), (1) the invoices which Mead prepared in support of the farmers' and ranchers' applications for payment of their Federal cost-shares were used by the Government in computing the amount of its share of the conservation practices it had previously approved; and (2) Mead's invoices intentionally overstated Mead's actual charges to the farmers and ranchers for his materials and services.

Appellees assert (Appellees' Brief, p. 18) that none of the claims filed with the Government were "false" since "the government paid no more than its proper percentage of the fair price and reasonable cost of the project." That contention, however, is irrelevant under the agricultural program here involved, for the regulations plainly contemplate a "cost-sharing" program. Under the regulations, the maximum Federal cost-share for each approved practice was to be "the percentage of the average cost of performing the practice considered necessary to obtain the needed performance of the practice, but which will be such that the farmer or rancher will make a substantial contribution to the cost of performing the practice" (Emphasis supplied). 1959 Regulations, Section 1101.1011(a), 23 Fed. Reg. 5250. ^{1/} Thus, the farmer or rancher was required to pay that

1/ Identical provisions are found in Section 1101.811(a) of the 1957 Regulations, 21 Fed. Reg. 5036, and Section 1101.911(a) of the 1958 Regulations, 22 Fed. Reg. 6485.

part of the cost of conservation materials or services furnished through the program for use in carrying out an approved practice which was "in excess of * * * the Federal cost-share" attributable to the use of the material or service. 1959 Regulations, Section 1101.1027(b), 23 Fed. Reg. 5252. ^{2/}

In other words, the United States did not undertake to pay for conservation practices on the basis of a contractor's alleged estimate of "fair price" or "fair value." Instead, the Government undertook a "cost-sharing" program under which it would pay a percentage of the actual cost of the practice to the farmer or rancher, who would make a substantial contribution by paying the balance. ^{3/} In the instant case, as demonstrated in our main brief (pp. 22, 25-27), the cost-sharing regulations were plainly frustrated since Mead's inflated invoices (1) caused the Government to pay out more money than it would have paid if a true invoice had been submitted, and (2) permitted the farmer or rancher to pay less than his proportionate share of the cost of the practice.

2/ Identical provisions are found in Section 1101.827(b) of the 1957 Regulations, 21 Fed. Reg. 5038, and Section 1101.927(b) of the 1958 Regulations, 22 Fed. Reg. 6486-6487.

3/ In ordinary commercial usage, the word "cost" signifies "the price, or part of it, paid by the buyer to the seller as consideration for the sale of goods." City Ice Delivery Co. v. United States, 176 F. 2d 347, 352 (C.A. 4). "Cost" is distinguished from "fair market" value (Buck v. Burk, 18 N.Y. 337, 340--1858) and takes into account any "discounts" which the purchaser receives (David Condon, Inc. v. Stein, 122 N.Y.S. 2d 567 (N.Y.C. Munic. Ct., 1953)). There is no doubt that "cost," under the regulations here involved, means the price actually paid by the farmer or rancher to the contractor.

There is no merit in appellees' contention (Appellees' Brief, p. 23) that Mead's invoices did not purport to represent to the Government the amount he actually was to receive from the farmer, but only represented the "fair price" or "true cost" for the project. In the context of the agricultural regulations here involved, there can be no doubt that the figures on the invoices submitted to the Government by Mead purported to represent the actual prices charged the farmers or ranchers. The various invoices are plainly marked "Bill to" defendant-appellee Chunn (Pltf's. Exh. No. 3); "Bill to" defendant-appellee Hohn (Pltf's. Exh. Nos. 22, 25, 34); "Bill to" defendant-appellee Quine (Pltf's. Exh. No. 42); "Bill to" defendant-appellee Johnson (Pltf's. Exh. No. 51); "Bill to" defendant-appellee Sence (Pltf's. Exh. No. 60); "Bill to" Henderson Ranch (of which Gale B. Graham was co-owner) (Pltf's. Exh. No. 68); and "Bill to" defendant-appellee Violet Mead (Pltf's. Exh. No. 72). In ordinary commercial usage, a "bill" represents "the creditor's written statement of his claim, specifying the items." 1 Bouvier's Law Dictionary, Rawle's Third Revision, p. 345. See, also, George M. Jones Co. v. Canadian Nat. Ry. Co., 14 F. 2d 852, 855 (E.D. Mich.), affirmed, 27 F. 2d 240 (C.A. 6), taking judicial notice of the fact that the word "bill" is "generally and customarily used in business and commercial intercourse as synonymous with 'charge' or 'invoice'."

4/ An "invoice" in ordinary commercial usage is "An account of goods or merchandise * * * which * * * ought to contain a detailed statement, which should indicate the nature, quantity, quality, and prices of the things sold, deposited, etc. * * *." 1 Bouvier's Law Dictionary, Rawle's Third Revision, p. 1682.

However, Mead's actual "written statement of his claim" or "charge" or "invoice" for the conservations materials and services was not, in fact, given on the documents filed with the Government, but appeared, instead, on the "duplicate" invoices which Mead prepared and sent to the farmers or ranchers. See pp. 5 and 14 of our main brief, and Pltf's. Exh. Nos. 42-A and 51-A. And the record shows that Mead's inflated invoices, which falsely represented to the Government the charges made to the farmers or ranchers, were used by the Government in computing the amount of its share of the practices (Tp. 52, 74, 204).

There is also no merit in appellees' contention (Appellees' Brief, p. 24) that the discounts given by Mead were "a personal gratuity" in which the Government had no interest. The short of the matter is that the Government needed to know about any such "discounts," for, under the agriculture regulations here involved, such "discounts" would result in a reduction of the amount of money which the Government would pay for the conservation practices. ^{5/}

^{5/} Contrary to appellees' assertion (Appellees' Brief, pp. 25-26), the district court did not find that the invoices were not inflated in the case of the transactions with Hohn and Chunn. Mead's own testimony indicates that Chunn did not make payments or contributions in the amount of the difference between the total reported cost and the Federal cost-share (see our main brief, pp. 10-11). As to Hohn, Mead's own testimony also indicates that in 1958 Hohn failed to make payments or contributions in the amount of the difference between the total reported cost and the Federal cost-share. The varying estimated contributions by Hohn for 1957 and 1959, as to which no finding was made, were not listed on the invoices submitted to the Government, as they were required to be (see our main brief, pp. 12-13, and p. 11, fn. 9).

2. Contrary to appellees' assertion (Appellees' Brief, p. 26), the district court did not, expressly or by implication, find that Mead did not have the state of mind which is a prerequisite of liability under the False Claims Act. Indeed, as we read the court's findings, they are adverse to Mead on this issue (see infra, pp 17-18). In any event, as we show below, on this record there can be no question but that Mead had the requisite state of mind for liability under the False Claims Act.

It should be noted initially that, contrary to appellees' statement (Appellees' Brief, p. 23), our main brief did not recognize any obligation on the part of the Government to establish any "fraudulent intent." The Government must prove that the defendant "knowingly" filed false bills or claims, but, as we first show, there is no requirement in the Act that a specific intent to defraud be proved. ^{6/} Moreover, as we shall go on to show, even if an intent to defraud is a necessary element in the Government's case, Mead had such intent. As Mead himself stated, "I knew at the time that the methods which I used to obtain the maximum cost share for the farmers were not proper * * * " (Pltf's. Exh. No. 81, p. 1). ^{7/}

6/ The United States Attorney made this same point at the trial (Tp. 318, 445-446).

7/ Appellees are also wrong in their assertion (Appellees' Brief, pp. 21-23) that the Government must prove its case by "clear and convincing evidence." As the Fourth Circuit stated in Toepleman v. United States, 263 F. 2d 697, 699, certiorari denied, 359 U.S. 989, the False Claims Act's "sanctions (continue

a. The False Claims Act provides for six different eventualities which will give rise to civil liability: (1) presenting a claim upon the Government, "knowing such claim to be false, fictitious, or fraudulent"; (2) using a false bill, receipt, etc., "knowing the same to contain any fraudulent or fictitious statement or entry" to obtain approval or payment of such a claim; (3) conspiring "to defraud the Government" by "obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim"; (4) delivering military property or money less than that for which a receipt was taken "with intent to defraud the United States" or "willfully to conceal such money or other property"; (5) delivering a receipt for property "without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States"; and (6) purchasing or receiving in pledge property from a serviceman, knowing that such person does not have the lawful right to sell or pledge such property. [Emphasis added.] R.S. § 5438 (1878). Only the third and fifth grounds of liability, which are not applicable to the instant case, require intent to defraud as an absolute, rather than alternative, element of the offense.

(continued)

are so far civil in character that the trial * * * includes such civil attributes as * * * proof by a preponderance of the evidence * * *." Even one of the cases cited by appellees, United States v. Park Motors, Inc., 107 F. Supp. 168, 176 (E.D. Tenn.), merely requires the Government to "show by the preponderance of proof that defendant * * * intended to and did present a false claim to the Government * * *." Furthermore, even if the standard is "clear and convincing evidence," that was certainly met here.

By way of contrast, the first and second grounds, which form the basis for liability in this case, provide for intent to defraud only as an alternative element. This explicit statutory pattern led the Tenth Circuit, in an opinion by Judge Phillips, to conclude in Fleming v. United States, 336 F. 2d 475, 479, certiorari denied, 380 U.S. 907, that a specific intent to defraud is not a necessary element of the Government's case under the first clause of the False Claims Act:

The first portion of the Act, that which the United States claims Fleming violated, provides for liability in the event of a "false, fictitious or fraudulent" claim. By the use of the disjunctive "or" Congress made it clear that any one of the three wrongful types of claim would subject the claimant to liability and that the claim need not be "fraudulent" so long as it is "false."

Further, it should be noted that the Act provides for six different eventualities which will give rise to liability for a \$2,000 forfeiture and double damages * * *

Only the third and fifth of such eventualities contains the element of fraud or intent to defraud as an absolute, rather than an alternative element. Had Congress intended to incorporate fraud or intent to defraud into each portion of the Act, it is unlikely that it would have done so expressly in two portions and not in the remaining portions.

To the same effect see United States v. Toepleman, 141 F. Supp. 677 (E.D.N.C.), reversed in part on other grounds sub nom.

United States v. McNinch, 242 F. 2d 359 (C.A. 4), reversed on other grounds sub nom. United States v. McNinch, 356 U.S. 595, where the district court held (141 F. Supp. at 683):

* * * the Government's case is made by showing that a false claim was knowingly filed and * * * it is unnecessary to show either an intent to defraud or resulting damage. In some of the clauses of the act it is expressly provided

that there must be shown an intent to defraud, but in the clause applicable here no such words are used. Proof of knowingly presenting a false claim is all that is required.

Record: United States v. Eagle Beef Cloth Co., 235 F. Supp. 91 (E.D.N.Y.).

Appellees' assertion that a requirement of "intent to defraud" should be read into the first two clauses of the False Claims Act is based upon the view expressed by some courts (Appellees' Brief, pp. 21-23) that the False Claims Act is penal in nature. A case chiefly relied upon by these courts is Morissette v. United States, 342 U.S. 246, 263, where the Supreme Court held that the omission from the criminal conversion statute (18 U.S.C. 641) of any mention of criminal intent could not be construed as eliminating that element of the crime.

There are two basic weaknesses in appellees' argument. First, the characterization of the civil remedies in the False Claims Act as penal has been thoroughly discredited by the Supreme Court. In United States ex rel. Marcus v. Hess, 317 U.S. 537, 549, the Supreme Court held that the Act is remedial and the sanctions civil, not penal. The Court stated (317 U.S. at 549):

We cannot say that the remedy now before us requiring payment of a lump sum and double damages will do more than afford the government complete indemnity for the injuries done it.

This rationale has been repeatedly reaffirmed. Rex Trailer Co. v. United States, 350 U.S. 148, 152-154; Koller v. United States, 359 U.S. 309; United States v. Hougham, 364 U.S. 310, 313.

The Morissette principle of construing criminal statutes to require criminal intent has a strong theoretical, if not constitutional, basis. The basic distinction between a civil and a penal sanction is that the latter carries with it societal condemnation. In the absence of criminal intent, it is generally regarded as unjust to condemn the individual. There is no basis, however, for applying the Morissette principle to a civil action under the False Claims Act.^{8/} A civil judgment against the defendant does not result in imprisonment or brand him a criminal. The civil remedies under the False Claims Act, including the double damages plus \$2,000 per claim recovery provision, are designed to insure that the Government be indemnified for damage and cost to it occasioned by the filing of a false claim. As the courts have recognized, "surely, no proof is required to convince one that to the Government a false claim, successful or not, is always costly." Toepleman v. United States, 263 F. 2d 697, 699 (C.A. 4), certiorari denied, 359 U.S. 989. It is submitted, therefore, that there is no basis for departing from the clear and unambiguous wording of the statute which imposes liability for filing a claim "knowing such claim to be false, fictitious,

8/ The Supreme Court in Morissette specifically recognized that the defendant "could be held liable for a civil conversion" without proof of intent to convert. 342 U.S. at 270, fn. 31.

or fraudulent" [Emphasis added]. See Acme Process Equipment Co. v. United States, 347 F. 2d 509, 527, fn. 26, reversed on other grounds, 385 U.S. 138, rehearing denied, 385 U.S. 1032, where the Court of Claims (per Davis, J.) rejected the assertion that intent to defraud is a precondition to liability under the first clause of the False Claims Act:

The Park Motors case [107 F. Supp. 168 (E.D. Tenn.)] held that the clause of the False Claims Act with which we are concerned requires a finding of specific intent to defraud. But the language of the statute discloses no such element. Since "proceedings [under the False Claims Act] are remedial and impose a civil [rather than a criminal] sanction." (United States ex rel. Marcus v. Hess, 317 U.S. 537, 549 * * *), we see no justification for adding a requirement that specific intent to defraud be proved.

Second, as the Supreme Court declared in Rainwater v. United States, 356 U.S. 590, 592, the provisions of the False Claims Act "must be 'given their fair meaning in accord with the evident intent of Congress'." And, as the Court recently stated in United States v. Neifert-White Co., 390 U.S. 228, 232: "In the various contexts in which questions of the proper construction of the Act have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil [footnote omitted]." In the instant case, the congressional intent is unmistakable--civil liability attaches whenever a claim is filed which is known to be "false, fictitious, or fraudulent [Emphasis added]." The suggestion that a requirement of intent to defraud was intended by Congress as a precondition to liability becomes rather strained when the other provisions of the Act are considered--some of which explicitly require intent to defraud.

We may add that this Court's decision in United States v. National Wholesalers, 236 F. 2d 944, certiorari denied, 353 U.S. 930, is not in irreconcilable conflict with the reasoning and authorities set out above. In National Wholesalers, the record indisputably established that the defendant had deliberately mislabeled goods sold to the Government, and this Court ruled that the "crude and deliberate mislabling" could have only one purpose -- viz., "to work a deceit on the government." 236 F. 2d at 950. Because the record plainly established a specific intent to defraud, the Government did not argue that any lesser standard for liability was required. Instead, the Government simply took the position that whatever state of mind was required for liability under the Act, it was met in the particular case. ^{9/} Thus, this Court's statement that "Undoubtedly there must be the intent to work a deceit on the government," citing the Morissette case (236 F. 2d at 950), did not constitute a rejection of any litigated contention that a lesser standard of liability was sufficient under the Act. ^{10/}

b. In any event, whatever the precise nature of the state of mind required for liability under the False Claims

^{9/} See Brief for Appellant; Reply Brief for Appellant.

^{10/} The other court of appeals decision cited by appellees, United States ex rel. Brensilber v. Bausch & Lomb Optical Co., 131 F. 2d 545 (C.A. 2), affirmed by an equally divided Court, 320 U.S. 711, was limited by the Second Circuit in United States ex rel. Weinstein v. Bressler, 160 F. 2d 403, 404, to the third type of liability under the Act, viz., conspiring to defraud the Government.

Act, we submit that the record indisputably establishes a violation of the Act in the case of defendant-appellee Lennard L. Mead. As the Tenth Circuit stated in Fleming v. United States, supra, 336 F. 2d at 479, "[W]here a person files a claim, which he knows is false, for the purpose of obtaining approval or payment of the claim, we think there is a reasonable inference, almost a necessary implication, that he intends to deceive."

As we have seen (supra, pp 2-3,5), under the agricultural regulations here involved, the Government's payments were based upon the "cost" of the practice to the farmer or rancher, and the Government derived its cost figures from the invoices prepared and submitted by Mead. Mead admitted that he knew that the Government's payments would be based upon the "cost of the particular project" to "whomever I was doing the work for" (Tp. 152-153), and that he "prepared [the] invoices which were used by the Government to determine the federal cost share * * * " (Tp. 204). In the light of these facts, and ordinary commercial usage, Mead must have known that the "Bill to" the various farmers or ranchers which he prepared and filed with the Government (see supra, p. 4) could have only one meaning to the Government -- viz., it represented the prices actually charged by Mead for his work. Thus, Mead clearly knew that the Government would make payments for the conservation practices on the basis of the actual cost figures represented on the bills which he filed with the Government. And those figures were clearly false -- for Mead admitted (Tp. 152-153) that the

figures on those invoices were not, in fact, the prices actually charged the farmers and ranchers. Those actual costs were contained on the "duplicate" invoices prepared by Mead, which he sent to the farmers and ranchers, but not to the Government (see supra, p. 5).

In short, we think it clear that Mead knew that by misrepresenting his actual arrangements with the farmers and ranchers he would receive more money from the Government than he would receive if he filed true invoices. Surely, therefore, Mead had whatever state of mind is required for liability under the False Claims Act.

Appellees' suggestion (Appellees' Brief, pp. 23-24) that Mead did not purport to represent the actual costs of the practices on the "Bill to" the farmers and ranchers which he filed with the Government, but only the "fair price" or "true cost" of the project, is, as we have seen, totally inconsistent with ordinary commercial usage and with Mead's admission that he knew that the Government's payments were to be based upon the actual cost to the farmer or rancher and that the Government would compute the payments on the basis of the invoices submitted to it by him (Tp. 152-153, 204). Mead's references at trial to "true cost" (Tp. 152-153) were obviously an attempt to justify his calculated deception on the specious theory that the Government "got its money's worth" (Tp. 383). As we have seen, however (supra, pp. 2-3), that argument is a non-sequitur under the agricultural regulations here involved.

e may add that, contrary to appellees' assertion (Appellees' brief, pp. 19-20), there is absolutely no evidence that Mead or any of the other defendant-appellees) were misled by the references to "fair price" in Form ACP-250, which were explained by the United States Attorney at trial as deriving from a wartime need to insure that the contractor did not receive excess profits (Tp. 317-318).

Although further evidence is hardly necessary, the record contains irrefutable proof that Mead had whatever state of mind is a requisite of liability under the False Claims Act. In a statement dated February 2, 1960, Mead stated, inter alia (Pltf's. Exh. No. 81, pp. 1-2):

I constructed several erosion control dams under the 1956, 1957, 1958 and 1959 programs. I knew that the regulations for the 1956, 1957 and 1958 programs in Ventura County, California, established the maximum Federal Cost Share payments to farmers under that practice at 30¢ per cubic yard for the earth used to construct the dam and that those cost shares were further limited to 80% of the practice costs. Also late in 1958 the program was changed to further limit the amount of the Federal Cost Share to not more than 60% of costs up to 30¢ per cubic yard. The same restriction applied to the 1959 program. However the 1959 maximum share was reduced to 24¢ per cubic yard late in 1959.

During 1956, 1957, 1958 and until about June of 1959 I constructed several of the erosion dams for 30¢ per cubic yard, the amount of the Federal Cost Share, but prepared invoices which were submitted to the Government showing costs in excess of that amount. I also furnished the farmers invoices listing the larger amount but then gave them discounts which reduced the amount of the statements or collected only the amount of the Federal Cost Share.

I knew at the time that the methods which I used to obtain the maximum cost share for the farmers were not proper but inasmuch as the Soil Conservation Service office at Moorpark, California, knew how I was invoicing the farmers and how I operated my business and approved of the procedure by even obtaining A.C.P. practice jobs for me under those conditions, I thought that the method was permitted. I also knew that other contractors were using similar methods of invoicing their work on ACP practices in this county. 11/

Sometime in June or July, 1959, Eldridge Cornell, the Manager of the County ASC office at Oxnard, California, asked to see my ACP records in connection with the Purchase Orders which I had submitted to his office. At that time I showed him my records and advised him of the method I used in invoicing and billing the farmers. He told me that my method was not permitted under the regulations and that a refund of excess payments would have to be made to the Government. I then ceased to give discounts to the farmers or to collect only the amount of the Federal Cost Shares. My business dropped considerably after that, in fact I did only about one tenth as much work in 1959 as I had done in 1958 under the Agricultural Conservation Program. Operating in line with the regulations nearly put me out of the construction business [emphasis added].

The above statement by Mead demonstrates beyond peradventure that he was thoroughly familiar with the government program, knew precisely what he was doing, and knew that he was defrauding the government. To reiterate, as he specifically stated above, "I knew at the time that the methods which I

11/ At the trial, appellees did not contend, and no evidence was introduced to establish, that any government agent had knowledge of any improper practices. See Pre-Trial Conference Order, Tr. 78-83. Indeed, such a contention would be pointless, for the United States cannot be estopped to assert violations of the False Claims Act by unauthorized acts of its agents. See Utah Power & Light Co. v. United States, 243 U.S. 389, 409; ANA Small Business Investments, Inc. v. S.B.A. (C.A. 9, Dkt. No. 21,214, decided March 12, 1968, Slip Opin., p. 5).

used to obtain the maximum cost share for the farmers were not proper * * * ." ^{12/}

Finally, we note that while the district court made no express finding on Mead's state of mind (and while none is necessary on this record), we think that the court below implicitly recognized that Mead had the state of mind necessary

12/ Despite his "limited education" (Appellees' Brief, p. 4), Mead managed to perform some rather complex calculations. E.g., his 1960 statement also contains the following admission (Pltf's. Exh. No. 81, p. 3):

Richard Quine

I constructed an erosion control dam for Richard Quine under the 1959 program. I agreed to build the dam for the Government cost share of 30¢ per cubic yard plus not more than \$500.00. The dam (actually 2) contained 7552.32 cu. yards of dirt and the spillway diversion ditch 621.29 cubic yards. I prepared an invoice for the Government, which I submitted to the County ASC office with my Purchase Orders listing the dam costs at 50¢ per cubic yard and the diversion ditch at 29¢ per cubic yard, the invoice totaled \$3956.09. The Federal cost share for the dam was 60% of the costs up to 30¢ per cubic yard and for the ditch 70% up to 20¢ per cubic yard, therefore I listed the dam costs at 50¢ per yard and 29¢ per yard on the ditch so that the Government would make the maximum payment. I prepared a separate invoice for Quine listing the total costs as \$2,993.96. I then gave an additional \$104.16 discount so that Quine's share of the invoice was \$500.00. (The Govt paid the remaining \$2389.80).

Mead's statement also contains the following admission with respect to the 1958 Hohn transaction (Pltf's. Exh. No. 81, p. 4):

* * * My hourly rate records disclosed that, on an hourly basis I would have charged \$1980.50 for the entire job and so even the Federal Cost Share [\$2064] was greater than my normal charges for the job.

for liability under the Act. 13/

B. THE MISTAKE CLAIMS

Appellees respond to our mistake claims against Mead 14/ by arguing that the Government "got its money's worth" (Appellees' Brief, p. 27). As we have demonstrated, however (supra, pp. 2-3), that argument is a non-sequitur, for under the agricultural regulations here involved the Government did not undertake to purchase conservation practices, but was simply engaged in a "cost-sharing" program. There is no doubt that the Government paid out more money than it would have paid out if the true facts had been known to it. Thus, the Government's mistake claims, as to which no statute of limitations exists, were plainly established. See United States v. Wirtz, 303 U.S. 414, 415; Grand Truck Wn. Ry. Co. v. United States, 252 U.S. 112, 120-121; Mt. Vernon Cooperative Bank v. Gleason, 367 F. 2d 289, 291 (C.A. 1); Kingman Water Co. v. United States, 253 F. 2d 588, 590 (C.A. 9); Anderson v. United States, 123 F. 2d 13, 16 (C.A. 9).

13/ Thus, the district court found, inter alia, that Mead (and the farmers and ranchers) understood that a portion of the total cost of the conservation work was to be charged to the farmer or rancher (Finding 15); that Mead advised the farmers and ranchers that he would perform conservation work for them "at a cost commensurate with" their ability to pay, and would, in certain cases, accept non-cash payments (Finding 17); that in cases where the work was done under such agreement, Mead prepared, and sent to the farmer or rancher involved, a separate invoice showing that Mead was giving the farmer or rancher a "discount" and that the farmer or rancher was paying "less than his proportionate share of the total cost of the work" performed by Mead (Finding 18); and that the documents filed with the United States "did not reflect the arrangements between the defendant Mead and the other defendants * * * " (Finding 20) (Tr. 103-104).

14/ The mistake claims are alternative to the False Claims Act claims except insofar as the statute of limitations may have run with respect to certain violations of the False Claims Act.

II. THE FALSE CLAIMS ACT AND MISTAKE CLAIMS AGAINST THE OTHER DEFENDANTS-APPELLEES

A. THE FALSE CLAIMS ACT VIOLATIONS

Our main brief demonstrated (pp. 28-29) that the other defendants-appellees "knowingly" made false claims upon or against the United States. As stated there, Mead testified that he usually sent a copy of the invoice he prepared for the Government to the farmer or rancher, and that, at about that time, he also mailed or gave the farmer or rancher the other invoice showing a discount (Tp. 140-141, 172, 210, 383-384). The Government witness, Mr. Cornell, testified that the forms (ACP-245 and CP-250), which contained Mead's inflated cost figures, were signed by the farmer or rancher after completion of the practice (Tp. 47, 61, 80, 86). And the district court found that the farmers and ranchers understood that part of the total cost of the conservation work was to be borne by them (Finding 15); and that Mead sent to the farmers and ranchers a separate invoice reflecting the fact that they were receiving a "discount" and paying "less than * * * [their] proportionate share of the total cost of the work" performed by Mead (Findings 17-18) (Tr. 103-104).

On this record, we submit that the only reasonable inference is that the other defendants-appellees were fully aware that the applications filed by them constituted false claims upon or against the United States, and that they also had whatever state of mind is necessary for liability under the False Claims Act.

Appellees' Brief relies (pp. 24-25) upon the protestations of lack of knowledge by most of the other defendants-appellees, and the claim of some of them that they did not know how the Government program operated. However, as shown above, the district court seems to have rejected those contentions.

There is, of course, no merit in appellees' assertion (Appellees' Brief, p. 25, fn. 8) that the district court's finding (No. 18) that Mead sent the discounted invoices to the farmers and ranchers may be disregarded because it is based upon the "misunderstanding" of appellees' counsel, which the district court "inadvertently overlooked." That finding is supported by Mead's testimony as to his general practice with regard to mailing "duplicate" invoices and is not clearly erroneous. Indeed, we doubt that appellees, whose counsel prepared the findings, may challenge any of them on appeal. See Brooks Bros. v. Brooks Clothing of California, 5 F.R.D. 14, 15 (S.D. Calif.); cf. John B. Stetson Co. v. Stephen L. Stetson Co., 133 F. 2d 129, 131 (C.A. 2).

We may add that if this Court does not agree with our contention that the record inescapably establishes that the other defendants-appellees had the requisite state of mind for liability under the False Claims Act, a remand for further findings on this issue would be in order, for the district court certainly did not make any findings absolving these defendants-appellees on the basis of lack of knowledge or intent to deceive.

B. THE MISTAKE CLAIMS

Appellees cannot refute our mistake claims against the other defendants-appellees by asserting (Appellees' Brief, p. 28) that they "received no payments and did not make or cause any mistake." Plainly, the farmers and ranchers derived substantial benefit from the agricultural program here involved, and their actions, together with those of Mead, caused the Government to make excessive payments under the program. The mistake claims against them, therefore, were clearly established.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

WILLIAM M. BYRNE, Jr.,
United States Attorney,

JOHN C. ELDRIDGE,
LEONARD SCHAITMAN,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

MAY 1968

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this reply brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my

opinion, the foregoing reply brief is in full compliance with those rules.

Leonard Schaitman

LEONARD SCHAITMAN,
Attorney,
Department of Justice,
Washington, D. C. 20530.

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA
CITY OF WASHINGTON

} ss.

LEONARD SCHAITMAN, being duly sworn, deposes and says:

That on May 24, 1968, he caused one copy of the foregoing
Reply Brief for the United States to be served by air mail,
postage prepaid, upon counsel for appellees:

David D. Kinley, Esquire
300 West 3rd Street
Post Office Box 312
Oxnard, California 93003

William L. Boyes, Esquire
2185 Ventura Boulevard
Camarillo, California 93010

Paul B. Noel, Esquire
60 Olson Road
Thousand Oaks, California 91360

Carl A. Stutsman, Jr., Esquire
445 South Figueroa Street
Los Angeles, California 90017

Leonard Schaitman
LEONARD SCHAITMAN,
Attorney,
Department of Justice,
Washington, D. C. 20530.

Subscribed and sworn to before
me this 24th day of May, 1968.

Notary Public
NOTARY PUBLIC

My Commission expires

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES
PASSED MAY 10, 1890

ALBANY, N. Y.: JAMES B. LEE, PRINTER.
1891.

THE LAND OFFICE HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF THE REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES, PASSED MAY 10, 1890, AND TO STATE THAT THE SAME HAS BEEN FORWARDED TO THE HOUSE OF REPRESENTATIVES, AND THAT THE COMMISSIONER OF THE GENERAL LAND OFFICE HAS BEEN ADVISED OF THE SAME.

Very respectfully,
JAMES B. LEE, PRINTER.

REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
IN RESPONSE TO A RESOLUTION OF THE HOUSE OF REPRESENTATIVES
PASSED MAY 10, 1890

No. 22,182 ✓

**United States Court of Appeals
For the Ninth Circuit**

SHELDON F. SACKETT, and KVAN, INC.,
a Washington corporation,

Appellants,

vs.

J. FRANK BEAMAN, and FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, a cor-
poration,

Appellees.

BRIEF FOR APPELLANTS

NATHAN S. SMITH,

JAMES G. SEELY, JR.,

220 Bush Street - Suite 976,

San Francisco, California 94104,

Attorneys for Appellants.

FILED

JAN 18 1968

W. B. LUCK, CLERK

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poration,

Appellees.

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of dismissal with prejudice entered on August 3, 1967, by the United States District Court for the Northern District of California, dismissing the complaint of plaintiffs, Sheldon F. Sackett and KVAN, Inc., a Washington corporation (hereinafter referred to collectively as "Sackett"). The District Court action was brought by Sackett for declaratory relief with respect to a contract for the sale of stock and promissory notes given pursuant thereto which were alleged to be unlawful and void because made and given in violation of the

Securities Act of 1933 and the Securities Exchange Act of 1934. The action also sought a preliminary and final injunction restraining the enforcement of a State Court judgment entered against Sackett with respect to said contract and said notes. The District Court's jurisdiction was invoked under 15 U.S.C. 77v, 15 U.S.C. 78aa and 28 U.S.C. 2201. Sackett filed his notice of appeal on August 4, 1967 in the District Court and this court's jurisdiction rests on 28 U.S.C. 1291.

STATEMENT OF THE CASE

1. Factual background

On November 8, 1961, Beaman sold Sackett 2,500 shares of the common stock of News Publishing Company, a Virginia corporation publishing a weekly newspaper in Portsmouth, Virginia. During the negotiations prior to the sale Beaman brought to San Francisco and showed Sackett a profit and loss statement of the company for the period ending August 24, 1961, which showed a net profit of \$5,285.00. Sackett paid \$1,000.00 down and gave notes for the remainder of the purchase price of approximately \$25,000.00.

Shortly thereafter, in December of 1961, Sackett received a copy of a financial statement of the company prepared by a firm of certified public accountants which showed net losses of \$37,612.34 as of October 31, 1961. Upon receipt of said statement, Sackett orally disaffirmed his contract with Beaman and, on December 29, 1961, sent Beaman a written notice of rescission.

2. Beaman's State suit

On January 24, 1962, Beaman filed suit against Sackett in the Superior Court of the State of California for the City and County of San Francisco, Action No. 518296. In that action, Beaman sought to recover approximately \$10,000.00, the amount then due on Sackett's notes. Sackett defended on the basis of his rescission and cross-complained for restitution of his \$1,000.00.¹ On May 5, 1965, Beaman obtained judgment against Sackett for \$10,591.50 plus interest and attorneys' fees. Sackett appealed, and execution of judgment was stayed by virtue of an appeal bond in the sum of \$20,500.00 which Sackett obtained from Fidelity and Deposit Company of Maryland. To do this, Sackett on or about June 22, 1965, assigned to Fidelity, as security, various savings and loan association certificates of deposit totaling \$20,500.00. The California Court of Appeal affirmed the decision of the lower court. The decision became final on May 22, 1967 when the California Supreme Court denied Sackett's petition for a hearing. In August, 1967, Fidelity paid Beaman \$18,733.71 in partial satisfaction of the judgment against Sackett.

3. The Federal suit

Sackett filed the suit below on April 20, 1967, seeking a declaration that the stock sale contract was void for alleged violations by Beaman of the Securities Act of 1933 and the Securities Exchange Act of 1934,

¹The validity of the sale under Federal securities laws was not litigated in the State action.

specifically Sections 77q and 78j of Title 28, U.S.C. and Securities and Exchange Commission Rule 10b-5. Sackett also sought an injunction restraining enforcement of the State court judgment pending determination of the Federal suit. Sackett's motion for preliminary injunction was denied on May 22, 1967. Sackett moved in this court for an injunction pending appeal. The motion was denied on June 21, 1967.

On June 13, 1967, Beaman moved to dismiss the action on various grounds, principally res judicata and collateral estoppel arising from the State court judgment and laches. The motion was argued on July 25, 1967, at which time the court stated it would grant the motion (R.T. 38-39) and directed counsel to prepare findings and judgment. The injunctive relief sought by Sackett having become moot when the State court judgment was satisfied (R.T. 50-51), Sackett sought, on August 3, 1967, to modify the proposed findings, conclusions and judgment so as to permit the filing of an amended complaint for damages. After oral argument on that date, the court below denied Sackett the right to amend and entered judgment dismissing Sackett's suit with prejudice.

STATUTES AND REGULATIONS INVOLVED

1. 15 U.S.C. 78j.
2. 15 U.S.C. 77q.
3. Securities and Exchange Commission Rule 10b-5.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that plaintiffs' damage claim was barred by the statute of limitations.
 2. The District Court erred in holding plaintiffs' claims were barred by res judicata and collateral estoppel.
-

QUESTIONS PRESENTED

1. Whether the defrauded buyer of securities can be deprived of his Federal remedy by a State action brought against him by the seller.
 2. Whether the statute of limitations governing a damage action under Federal securities laws can be applied to deprive a defrauded buyer of securities of his Federal remedy while he is litigating the validity of his rescission of the sales contract in a State action.
-

ARGUMENT

- I. **THE DISTRICT COURT ERRED BY REFUSING PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT TO STATE THEIR CLAIMS FOR DAMAGES.**
- A. **The failure of the District Court to grant plaintiffs leave to amend their complaint constitutes reversible error.**

At or near the time of the judgment below, Fidelity and Deposit Company of Maryland (which had bonded Sackett's State court appeal) paid Beaman over \$18,000.00 in satisfaction of the State court judgment. This entitled Fidelity to reimburse itself in a like

amount from collateral which Sackett had posted with it in June of 1965. With satisfaction of the State court judgment, Sackett's effort to obtain a Federal injunction against its enforcement became moot. Sackett accordingly sought leave to amend his complaint to claim his damages. See Plaintiffs' Proposed Modifications to Form of Judgment and to Findings of Fact and Conclusions of Law (C.T. 238-254). The court below, at a hearing on August 3, 1967, refused to permit the amendment (R.T. 42-55). The court said:

"I can't see how you could find, on a claim of statute of limitations, anything that would be any different than that which would produce a finding of laches." (R.T. 46)

The court suggested that Sackett file another complaint for damages, but conceded that such a complaint would be barred by res judicata or collateral estoppel resulting from the judgment about to be rendered by the court below (R.T. 47).

The failure to give plaintiffs the opportunity to amend their complaint constitutes reversible error. *Cohen v. Gensbro Hotel Co.* (9th Cir. 1958) 259 F.2d 78.

B. The District Court erred in holding that plaintiffs' claims for damages were barred by the statute of limitations.

- (1) Even if a State statute of limitations were applicable, plaintiffs' cause of action for damages could not have accrued over three years ago.

The following contentions are founded on the assumption, *arguendo*, that the California statute of limitations governing fraud claims (Code of Civil

Procedure Section 338(4)) is applicable to plaintiffs' claim for damages under Federal securities laws. This, however, is not conceded.

California statute provides that the various periods prescribed for commencing actions are to be computed from accrual of the cause of action. California Code of Civil Procedure § 312.² The central question, therefore, is when Sackett's cause of action for damages accrued.

The general rule in California is that a cause of action accrues when "under the substantive law, the wrongful act is done and *the obligation or liability arises*, i.e., when a suit may be brought." Witkin, *California Procedure*, p. 614.

Under the plain language of 15 U.S.C. § 77q³ a violation occurs whenever a party obtains money or property by means of a prohibited statement or omission to state. Thus, in August 1967, when Beaman obtained the sum of \$18,733.71 (by means of the untrue financial statement and by means of an omission

²"Civil actions, without exception, can only be commenced within the periods prescribed in this title, *after the cause of action shall have accrued*, unless where, in special cases, a different limitation is prescribed by statute." (Emphasis added.)

³Section 17a of the Federal Securities Act of 1933 (15 U.S.C. § 77q) provides in pertinent part:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means of instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly . . . (2) *to obtain money or property* by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." (Emphasis added.)

to state material facts) a cause of action for damages arose.⁴

The court below ignored the fact that obtaining money or property by means of a violation of the Federal securities laws is unlawful even though the statutory violator makes use of a State court to accomplish his design (R.T. 49-50). The violation of a Federal statute cannot be legitimated by the judgment of a State court which not only failed to consider the Federal questions but (insofar as the Securities Exchange Act of 1934 is concerned) was totally lacking in jurisdiction to do so. The court in *Key Broadcasting System, Inc. v. Griffith* (1953) 119 N.Y.S.2d 174 applied this principle in a similar situation.⁵

Sackett's cause of action for damages under the Securities Exchange Act of 1934 (15 U.S.C. § 78j) and Rule 10b-5 likewise did not accrue until the fact of

⁴It is not necessary to decide whether the entry of judgment in the State court action in May 1965, or the finality of that judgment in May 1967, would constitute separate violations. Claims made on those theories would also be timely, since both events occurred within the last three years.

⁵In that case, the seller sued to recover on a contract for the purchase of securities. The buyer defended on the ground that the contract was a violation of the Securities Act of 1933. The seller argued that this defense was not available because the buyer would be barred by the statute of limitations from bringing an affirmative action under the provisions of the Act on which his defense was based. The court held that the statute was not a bar in this situation and stated:

"To construe it to so apply would lead to the anomalous situation wherein the statutory wrongdoer would be allowed to recover, because the one or three year limitation, as the case may be, had run, and then the wronged party would have one year to sue to get the consideration back, *although it was paid under a judgment.*" (At 175-176. Emphasis added.)

damage was definitely established, which was not before May 1965. For "uncertainty as to the fact of damage . . . negatives the existence of a cause of action." *Walker v. Pacific Indemnity Co.* (1960) 183 C.A.2d 513. In that case the court said:

It is clear that mere possibility, or even probability, that an event causing damage will result from a wrongful act does not render the act actionable (*Pacific Pine Lumber Co. v. Western Union Telegraph Co.*, *supra*, 123 Cal. 428; *McQuilkin v. Postal Tel. Cable Co.*, 27 Cal.App. 698, 703 [151 P. 21]; and see *McGregor v. Wright*, 117 Cal. App. 186, 196-197 [3 P.2d 624]). Of course, it is uncertainty as to the fact of damage, rather than its amount, which negatives the existence of a cause of action (*Allen v. Gardner*, 126 Cal.App.2d 335, 340 [272 P.2d 99]; *Milton v. Hudson Sales Corp.*, 152 Cal.App.2d 418, 434 [313 P.2d 936]). In the case at bar, the fact of any damage at all was completely uncertain until judgment in the personal injury action.

Also significant are decisions holding that, in specific situations where the existence of actual loss is determinable only by judgment, the statute of limitations is tolled at least for the period required for determination on appeal (*County of Santa Clara v. Hayes Co.*, 43 Cal.2d 615 [275 P.2d 456]; *Burns v. Massachusetts etc. Ins. Co.*, 62 Cal. App.2d 962 [146 P.2d 24]; *Archer v. Edwards*, 19 Cal.App.2d 253 [65 P.2d 115]). (At 517)

See also,

Witkin, *California Procedure*, 1965 Supp., p. 265.

Thus, a damage claim based on fraud does not accrue until damages are definitely sustained. *Agnew v. Parks* (1959) 172 C.A.2d 756, 768 where the court said:

“It is the rule that fraud without damage is not actionable . . . and one is not entitled to any relief thereon unless damage is alleged and proved.”

The record establishes that Sackett unilaterally rescinded the contract in December 1961 shortly after discovery of the misrepresentations by Beaman. Under California law, such a unilateral rescission is effective without judicial action. California Civil Code §§ 1688, 1691-92. Witkin, *Summary of California Law*, 1965 Supp., pp. 84 et seq. The rescission was therefore effective from December of 1961 until May of 1965 when the Superior Court ruled that it was invalid. In the interim Sackett could neither allege nor prove that he had been damaged.

In summary, Sackett's cause of action for damages under 15 U.S.C. §77q accrued when Beaman obtained money, which did not occur until August 1967. Likewise, Sackett's cause of action under 15 U.S.C. §78j and Rule 10b-5 did not accrue until he sustained definite damage. This did not occur until May 1965 when his rescission was adjudged invalid by the State court. Hence Sackett's damage claims cannot be time-barred until May 1968.

- (2) Even if the State statute of limitations were applicable and even if plaintiffs' cause of action had accrued in 1961, the statute of limitations was suspended during pendency of the State action.

During the pendency of the State court action, Sackett was effectively prevented from suing for damages under Federal securities laws. In the first place, as pointed out above, he could not have either alleged or proved the existence of damage attributable to Beaman's misrepresentations until May 1965 when the State court entered judgment. In the second place, Sackett was bound by the election of remedies doctrine under California law. Under this doctrine it has always been the rule in California that a litigant must choose between affirmance of a contract coupled with a suit for damages, on the one hand, and disaffirmance of the contract and suit for restitution, on the other.⁶ As has been noted above, Sackett promptly on discovery of the misrepresentation chose the latter course.

⁶*Paularena v. Superior Court* (1965) 231 C.A.2d 906, 915:

The remedy based upon the existence of the contract to purchase is inconsistent with the remedy based upon its nonexistence. (*Davis v. Rite-Lite Sales Co.*, 8 Cal.2d 675, 678-679 (67 P.2d 1039); *Leonard v. Edmonds*, *supra*, 151 Cal. App. 2d 765, 768.) Damages may not be recovered on the theory that the contract exists and additionally on the theory that the contract is at an end.

Jozovich v. Central Calif. B. G. Assn. (1960) 183 C.A.2d 216, 228-229:

The cases have recognized the common-sense rule that an aggrieved party may not simultaneously pursue inconsistent procedures for relief. In the case of breach of contract he may treat the agreement as alive and effective, suing for damages for breach, or he may assume the contract dead and proceed to obtain restitution. But damages and restitution constitute alternative remedies and an election to pursue one is a bar to invoking the other. (*Alder v. Drudis* (1947) 30 Cal.2d 372 (182 P.2d 195); 12 Cal.Jur.2d, Contracts, p. 491, sec. 260.)

He gave prompt written notice of rescission pursuant to California statutes. When he was subsequently sued by Beaman in the State court, he defended on the basis of his rescission and cross-complained for restitution of the \$1,000.00 which he had paid. Under these circumstances, Sackett could not at any time prior to May of 1965 have placed himself in a contrary position in a Federal suit without thereby ruining his defense in the State court. Such a Federal suit prior to May of 1965 would have been used as evidence in the State court that Sackett had abandoned his claim that the contract had been rescinded. *Dolinar v. Pedone* (1944) 63 C.A.2d 169, 146 P.2d 237 (pleading may be offered as an evidentiary admission against the pleader in another case).

The situation calls for application of the California rule that the statute of limitations is suspended during any period when pending legal proceedings prevent an effective suit. This principle is explained in Witkin, *California Procedure*, pp. 674-675, and has been enunciated and applied in a long line of California decisions.

Lerner v. Los Angeles City Board of Education (1963) 59 C.2d 382, 391, 29 Cal.Rptr. 657, 380 P.2d 97;

Santa Clara v. Hayes Co. (1954) 43 C.2d 615, 618, 275 P.2d 456;

Skaggs v. City of Los Angeles (1954) 43 C.2d 497, 500, 275 P.2d 9;

Dillon v. Board of Pension Commrs. (1941) 18 C.2d 427, 431, 116 P.2d 37;

Lee C. Hess Co. v. City of Susanville (1959)
 176 C.A.2d 594, 1 Cal. Rptr. 586;
Van Hook v. So. Cal. Waiters Alliance (1958)
 158 C.A.2d 556, 565, 323 P.2d 212;
Christin v. Superior Court (1937) 9 C.2d 526,
 530, 71 P.2d 205.

(3) In any event a Federal court is not bound to apply a State statute of limitations to defeat the assertion of Federal rights.

The parties are in agreement that there is no Federal statute of limitations applicable to the case at bar. While the Federal courts under such circumstances have frequently applied the analogous State statute of limitations, they will refuse to do so where in a proper case it would defeat the assertion of Federal rights. Thus, in *Fischbach & Moore, Inc. v. Int'l Union* (S.D. Cal. 1961) 198 F.Supp. 911, 914-915, the court, after reviewing a case involving the Fair Labor Standards Act, stated:

The reasoning of the Davis case is clearly applicable to the case at bar. Like the Fair Labor Standards Act, the Labor Management Relations Act is a statute relating to interstate commerce. Similarly, the statute is a matter of national concern and it has been recognized by the Supreme Court that the purposes underlying the Labor Management Relations Act imply a policy of uniform application of the statute to all persons subject thereto. Further, the prohibitions of the Act would be set at naught and its benefits denied to the plaintiffs herein if the California statute of limitations were applied. Finally, the plaintiffs in this action would receive treatment unequal to

that accorded more fortunate plaintiffs in other states having longer limitations periods, if California Code of Civil Procedure, § 338, subd. 1 were utilized by this court. For all these reasons, the court declines to so act.

All these considerations are equally applicable to the Securities Act of 1933 and the Securities Exchange Act of 1934.

C. Unless plaintiffs are permitted to present their damage claims in the present proceeding they will be denied a hearing on their Federal claims.

The court below dismissed Sackett's equitable claims primarily on the ground of laches. In arriving at this conclusion the court erroneously stated that any claim for damages was barred three years after the discovery of the misrepresentations of Beaman, i.e. three years after December 1961. From this conclusion the court reasoned that it was proper by reference to the statute of limitations to conclude that laches would bar an equity suit.

This approach of the court, as well as the court's explicit language,⁷ makes it clear that the ruling intended to foreclose any further action of any kind by Sackett arising out of the sales contract. Sackett would thus be met in any subsequent action for damages with the contention that the decision below precluded such

⁷The court said:

"It seems to me that this (the judgment below) has the effect of cutting you off at the pockets completely, regardless of how I word it, for damages or equitable relief or anything else. * * * On the theory I have adopted . . . you couldn't state a cause of action for damages which wouldn't be vulnerable to a claim of untimeliness." (R.T. 45-46)

further action on principles of res judicata and collateral estoppel. That problem makes the present appeal crucial. Absent a reversal on the issue of the right to amend, Sackett's Federal rights created by Congress and entrusted exclusively to the Federal courts will have been completely destroyed.

II. THE DISTRICT COURT ERRED IN HOLDING PLAINTIFFS' CLAIMS WERE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL.

A. Plaintiffs did not litigate their Federal claims in the State court action.

Sackett's defense in the State court was confined to his unilateral rescission (based on fraud, failure of consideration and mistake under California law). His only affirmative action in the State court was his corresponding claim for restitution of the \$1,000.00 he had paid Beaman. This is established by the following documents constituting part of the file in Action Number 518296 in the Superior Court of the State of California for the City and County of San Francisco:

1. Judgment (copy attached to Declaration of Rudolph J. Scholz dated May 8, 1967, C.T. 22-23).

2. Amended Answer and Cross-Complaint (copy attached to aforesaid Declaration, C.T. 31-39).

3. Findings of Fact and Conclusions of Law (copy attached to aforesaid Declaration, C.T. 24-30).

4. Complaint (copy attached to Affidavit of Nathan S. Smith dated May 18, 1967, C.T. 80-83).

In none of the foregoing documents is there any mention made of any violation of the Securities Act of 1933 or the Securities Exchange Act of 1934. Therefore, it is beyond dispute that the Federal claims presented to the court below were reserved throughout the State court litigation. In this connection the United States Supreme Court has stated that an explicit reservation is not indispensable. The court said, "[T]he litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he . . . fully litigated his Federal claims in the State Courts." *England v. Louisiana Medical Examiners* (1964) 375 U.S. 411, 421.

B. The right to litigate Federal claims in Federal court is absolute.

Even where Federal jurisdiction is not exclusive, parties have an absolute right to litigate their Federal questions in Federal court. *England, supra*. In that case, an attack on a Louisiana statute on Federal constitutional grounds was presented in the Federal court. The Federal court abstained pending a decision by the Louisiana courts as to the applicability of the statute. The Federal plaintiffs, having lost their case in the Louisiana courts, returned to the District Court for a determination of their constitutional claim. The United States Supreme Court held that a party cannot be forced to litigate his Federal claims in a State court. Only one limitation is imposed—the right may be lost if the Federal claim is voluntarily submitted to and fully litigated in the State court.

This limitation has no application in the case at bar because plaintiffs did not litigate their Federal claims in the State court. Furthermore, plaintiffs here were initially brought involuntarily into State court by virtue of Beaman's suit against them. Beaman's counsel have conceded that Sackett never had any right to remove the State case to Federal court. R.T. 18-19.

We cannot state our essential argument any better than was done by Mr. Justice Brennan in *England, supra*, at 415:

“There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. . . . Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts, and with the principle that ‘When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction * * *. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.’”

Justice Brennan went on to note that access to the Federal court at the trial level is of great importance and its absence cannot be justified by the existence of the right of review in the United States Supreme

Court of a final judgment of a State court. He said that such review is "an inadequate substitute for the initial District Court determination."

"This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims." (At 416.)

These principles apply forcefully in the case at bar. The plaintiffs here were doomed insofar as the State court relief is concerned by the finding of the trial court in May of 1965 that the now conceded falsity of the financial statement on which plaintiffs relied was not material. (See State Court Findings of Fact and Conclusions of Law, Findings Nos. 13(a) and 13(b); C.T. 29.) Appellate review in the California courts was ineffective largely because the California Court of Appeal thought that there was evidence which to some extent supported the trial court's conclusion. Thus plaintiffs here have since May of 1965 been "encased" by a State court finding.⁸ In such a situation their right to present their Federal claims in Federal court is of the utmost importance.

⁸"A litigant trapped in State Court proceedings may find himself veritably encased by findings of fact which no appellate court may disturb." *England, supra*, at p. 436.

C. Principles of res judicata do not override the principles of England v. Louisiana State Board.

Congress provided that the Federal courts shall have exclusive jurisdiction of violations of the Securities Exchange Act of 1934. 15 U.S.C. 78aa. If, as the court below indicated, plaintiffs are barred by principles of res judicata or collateral estoppel, then it is apparent that the effort of Congress to provide a Federal forum for such questions can be completely defeated in any case where a fraudulent seller of stock brings prompt suit in the State court. By so doing, he can force the defrauded party into the position of the plaintiffs in the case at bar. They will be helpless to remove the State court action, and if unsuccessful in the State courts, will be barred from subsequent access to Federal courts by the doctrines erroneously applied by the court below.

The applicability of res judicata so as to defeat Federal jurisdiction was considered and rejected in the *England* case.

Justice Douglas, there considering the possible effect of res judicata on the right of a party to litigate his Federal claims in a Federal court, stated: "But res judicata is not a constitutional principle; it has no higher dignity than the principle we announce today." 375 U.S. 411 at 429.

In the court below, Beaman placed his principal reliance on the case of *Connelly v. Balkwell* (D.C. N.D. Ohio 1959) 174 F.Supp. 49, aff'd (6th Cir. 1960) 279 F.2d 685, which was decided four years prior

to *England*. Insofar as *Connelly* may imply that a party may by consent endow a State court with jurisdiction over Federal questions committed by Congress to the exclusive jurisdiction of the Federal courts, it is clearly erroneous. Insofar as the result reached in *Connelly* may be justified on the ground that the plaintiff there voluntarily chose the State court before presenting his Federal question in Federal Court, it has no application in the case at bar. For, as we have said, plaintiffs here did not select the State forum, but were forced there by Beaman's action.

III. IN ANY EVENT A STATE COURT JUDGMENT CANNOT DEPRIVE A FEDERAL COURT OF THE EXCLUSIVE JURISDICTION GRANTED IT BY CONGRESS.

Congress granted to the Federal courts exclusive jurisdiction over violations of the Securities Exchange Act of 1934:

“The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States, shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.” 15 U.S.C. 78aa.

In view of this, the Federal courts cannot be bound by any State court determination directly or indirectly affecting a violation of the Securities Exchange Act

of 1934. This is made clear by *Restatement of Judgments*, Section 71, which reads as follows:

“Where a court has incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent action brought to determine the matter directly.”

The example cited in Comment c of Section 71 precludes any doubt in this regard:

“The rule stated in this Section is applicable where a State Court has incidentally determined a matter which the federal courts alone have jurisdiction to determine directly.

If an action is brought in a State Court on a promissory note, and the defendant in his answer alleges that the note was given for a void patent, the decision of the court that the patent was or was not void is not binding in a subsequent action brought in a federal court to have the patent declared void, or to enjoin an infringement of the patent, although the subsequent action is between the same parties, since the federal courts have exclusive jurisdiction to set aside a patent or entertain a suit for its infringement.”

The case at bar is even more clear, for the Federal questions, as shown above, were not even incidentally determined by the State court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's judgment of dismissal with prejudice and order denying plaintiffs leave to amend their complaint to state a claim for damages be reversed, and the cause remanded with instructions to vacate said judgment and to grant plaintiffs leave to file an amended complaint.

NATHAN S. SMITH,
JAMES G. SEELY, JR.,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN S. SMITH,
Attorney for Appellants.

No. 22,182

United States Court of Appeals
For the Ninth Circuit

SHELDON F. SACKETT, and KVAN, INC.,
a Washington corporation,

Appellants,

vs.

J. FRANK BEAMAN, and FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, a
corporation,

Appellees.

BRIEF FOR APPELLEE

J. FRANK BEAMAN

RUDOLPH J. SCHOLZ,
EVERETT S. LAYMAN, JR.,

220 Bush Street,

Room 1411, Mills Tower,

San Francisco, California 94104,

Attorneys for Appellee

J. Frank Beaman.

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No. 22,182

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SHELDON F. SACKETT, and KVAN, INC.,
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J. FRANK BEAMAN, and FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, a
corporation,

Appellees.

BRIEF FOR APPELLEE

J. FRANK BEAMAN

STATEMENT OF THE CASE

For convenience, appellants Sheldon F. Sackett and KVAN, Inc. are referred to as "Sackett," and "KVAN" respectively. Appellee, J. Frank Beaman, is referred to as "Beaman."

This is a suit commenced on April 20, 1967, by Sackett and KVAN against Beaman and Ernest S. Johnston ("Johnston") for declaratory judgment and injunction (R. 1). The subject matter concerns a written contract (R. 185-186) for the sale of stock (hereinafter referred to as "contract of sale") entered into on or about November 8, 1961 (R. 1, 4), allegedly in-

valid because of a purported violation of the Securities Act of 1933, 15 USC § 77q (herein called the "1933 act"); the Securities Exchange Act of 1934, 15 USC § 78j (herein called the "1934 act"); and applicable rules of the Securities and Exchange Commission (17 CFR part 240). (R. 1, 2, 4, 5, 6). 17 CFR 240.10b-5 is for convenience usually referred to as "Rule 10b-5." All such acts and rules are collectively called the "federal securities acts."

The contract of sale was made in 1961 between Beaman and Johnston as the selling parties, and Sackett and KVAN as the buyers, for 2,500 shares of the capital stock of News Publishing Company, a Virginia corporation. The contract of sale provided that of the sums due thereunder, \$1,000 was to be paid upon signing and the balance payable at later dates, the major portion of which was to be evidenced by promissory notes (R. 185). Appellants paid the \$1,000 upon execution (R. 35, lines 18-19; R. 28, lines 16-19) and the promissory notes called for under the contract of sale were made and delivered by appellants (R. 25-27).

On December 30, 1961, less than two months after execution of the contract of sale, Sackett, on behalf of himself and purporting to act on behalf of KVAN, gave Beaman an alleged notice of rescission with respect thereto and as to the promissory notes (R. 29, lines 15-19).¹

¹Appellants concede that the discovery of the facts presumably giving rise to a cause of action was made in 1961 (Rep.Tr. 43, lines 4-5).

On January 24, 1962, Beaman commenced action No. 518296 in the Superior Court of the State of California, in and for the City and County of San Francisco, against appellants for recovery under the contract of sale and the promissory notes as to the amounts then due, plus fees, interest and costs (herein called the "first state court action") (R. 80). Sackett and KVAN, on April 3, 1964, filed in the first state court action an amended answer and cross-complaint alleging that the contract of sale was void by reason of (i) want of consideration, (ii) material mistake, and (iii) fraud,^{1a} both as defenses and as a basis for the cross-complaint (R. 31-38).

The first state court action resulted in:

(a) Judgment at the trial level rendered May 3, 1965, in favor of Beaman as prayed, and denying recovery on the said cross-complaint (R. 22-23).

(b) Judgment affirmed on March 22, 1967 by the Court of Appeal of the State of California, First Appellate District, Division One, proceeding 1 Civil 23182 (R. 219-236).

(c) The judgment became final on May 22, 1967 (R. 195).

On December 24, 1965, Beaman commenced action No. 562356 in said Superior Court against appellants, for recovery of the sums then due under the contract of sale and promissory notes which had not accrued

^{1a}Appellants in the first state court action also argued that negligent misrepresentation (R. 231) and breach of fiduciary obligation (R. 233) were grounds on which the contract of sale could be voided.

at the time the first state court action was begun (R. 86-88). Said action, No. 562356, is herein for convenience called the "second state court action."

On April 20, 1967, *more than five years after the commencement of the first state court action*, appellants filed in the court below their complaint for declaratory relief and injunction against Beaman and Johnston (R. 1). This complaint was the subject of Beaman's noticed motion to dismiss filed herein on May 9, 1967 (R. 18).

On May 3, 1967, appellants filed in the court below an amended complaint for declaratory relief and injunction against Beaman and Fidelity and Deposit Company of Maryland (R. 4). Beaman, on June 13, 1967, filed a noticed motion to dismiss such amended complaint (R. 142).

On July 17, 1967, appellants filed in the court below a noticed motion for a preliminary injunction restraining Beaman from prosecuting the second state court action (R. 176)² which was denied by order of the court on September 5, 1967 (R. 282).

Beaman's two motions to dismiss were heard concurrently on July 25, 1967, Honorable Lloyd H. Burke presiding, and resulted in the Judgment of Dismissal with Prejudice, filed in the court below on August 3,

²Appellants, in the court below, attempted by noticed motion to secure a preliminary injunction restraining Beaman from enforcing the judgment in the first state court action. Such motion was denied on May 22, 1967. Appellants attempted to secure a similar injunction from this Court pending appeal (Proceeding No. 21889) and the motion therefor was also denied in June of 1967. Such actions are reflected in the docket entries (R. 280-281).

1967 (R. 267), entered of record on August 10, 1967 (R. 282).

Subsequent to the hearing on said motions but prior to filing the Judgment of Dismissal, appellants filed in the court below on August 2, 1967, a document entitled "Plaintiffs' Proposed Modifications to Form of Judgment and to Findings of Fact and Conclusions of Law" (R. 238), wherein appellants requested that the findings and judgment submitted by Beaman (R. 263-268) "be modified to permit plaintiffs to file an amended complaint for damages" (R. 238, lines 27-28). The court impliedly denied such request (Rep. Tr. p. 45, line 8 to p. 55).

Appellants' Notice of Appeal was filed in the lower court on September 1, 1967, appealing "from the Judgment of Dismissal with Prejudice signed on August 3, 1967, and entered of record on August 10, 1967." (R. 278)

Beaman stipulates, for the purpose of this appeal, that on August 22, 1967, there was paid to him by Fidelity and Deposit Company of Maryland, the sum of \$18,870.22, by reason of its liability as surety on an appeal bond in the first state court action.

QUESTIONS PRESENTED

1. Is Beaman entitled to judgment as a matter of law?

2. May a buyer bring a federal suit for an alleged violation of federal securities acts (a) more than five years after accrual of any claim, and (b) notwithstanding an adverse determination in a state court after a full trial on the merits as to his contentions of fraud, misrepresentation and mistake?

SUMMARY OF ARGUMENT

Even if the lower court's denial of appellants' request to amend is properly before this court, such denial was not an abuse of discretion. Beaman is entitled to judgment as a matter of law in that appellants' claims are time barred and are also blocked by the doctrines of res judicata, collateral estoppel and laches. Any deprivation of a federal remedy occurred because of appellants' own acts and omissions.

ARGUMENT

1. NO GENUINE ISSUE AS TO ANY MATERIAL FACT.

(a) Motion for dismissal shall be treated as one for summary judgment.

Kithcart v. Metropolitan Life Ins. Co. (8th Cir. 1945) 150 F. 2d 997, 1000; cert. denied 326 U.S. 777.

(b) The question presented in any summary judgment matter is:

(i) Whether there is any genuine issue as to any material fact and if not,

(ii) whether movant is entitled to judgment as a matter of law.

Turner v. Lundquist (9th Cir. 1967) 377 F. 2d 44, 46;

U.S. v. Carroll (DC Ark. 1962) 203 F. Supp. 423.

(c) No issue of fact.

No issues of fact are apparent to us (appellants have raised none); therefore, we proceed to the question of whether Beaman is entitled to judgment as a matter of law.

2. THE APPELLATE COURT IS WITHOUT JURISDICTION TO CONSIDER DENIAL OF APPELLANTS' REQUEST TO AMEND.

Appellants' request to amend was made as part of their proposed modification of findings and judgment filed eight days after the trial court's decision on July 25, 1967, to grant a dismissal of appellants' action. The trial court by implication denied such request, and the Judgment of Dismissal from which appellants have appealed (Notice of Appeal R. 278) contains no such reference to the request for amendment or a denial thereof (Statement of the Case, *supra*, p. 5). Obviously, the form of judgment was prepared prior to the time any request to amend was made and cannot by reasonable interpretation be said to cover the denial of such request.

Since appellants' Notice of Appeal does not refer to the trial court's denial of their request to amend, this Court is without jurisdiction to consider such denial on the present appeal.

Gunther v. E.I. duPont de Nemours & Company (4th Cir. 1958) 255 F. 2d 710, 717.

3. IF THE DENIAL OF APPELLANTS' REQUEST TO AMEND IS PROPERLY BEFORE THE COURT, THERE WAS NO ERROR BY THE COURT BELOW IN MAKING SUCH DETERMINATION.

Assuming, but not conceding, that the denial of appellants' request to amend is properly before the court,

(a) the matter of amendment is within the sound discretion of the trial court.

Caddy-Imler Creations, Inc. v. Caddy (9th Cir. 1962) 299 F. 2d 78, 84;

Canister Co. v. Leahy (3rd Cir. 1951) 191 F. 2d 255, 257; cert. denied 342 U.S. 893 [A District Court has wide latitude in permitting or rejecting amendments to pleadings.]

(b) the trial court did not abuse its discretion in denying appellants' request to amend.

(i) After a dismissal of his action, a plaintiff should move under Rules 59(e) or 60 (b), Federal Rules of Civil Procedure to reopen, rather than request the court to permit the filing of an amended pleading (the procedure appellants chose to follow).

3 *Moore's Federal Practice* (2d edition) ¶15.10 at p. 959.

(ii) No abuse of discretion where requested amendment simply involves a change in legal theory.

Caddy-Imler Creations, Inc. v. Caddy, supra, holding there was no clear abuse of discretion in trial court's refusal to change entire legal theory of the case after introduction of all evidence was complete.

Stanek v. Trailmobile, Inc. (7th Cir. 1960) 283 F. 2d 827, 828, involving the trial court's denial of an oral motion to amend a complaint to change claim for relief from damages to rescission.

Appellants propose an amendment which purports to set forth a claim for damages (Brief for Appellants, p. 6), rather than declaratory relief. No new facts³ are alleged other than the allegation that Beaman obtained the sum of \$18,870.22 on July 31, 1967⁴ pursuant to the judgment in the first state court action (R. 252-253).

Nothing more than a change in legal theory is involved. The issue of *when* appellants' alleged claims for damages accrued is discussed below (infra p. 13).

See:

2 *Within California Procedure* §191 at pp. 1168-69.

³As distinguished from conclusions of law and appellants' self-serving statements (R. 252-253).

⁴In fact, such sum was received on August 22, 1967, *after* the requested amendment (Statement of the Case, supra p. 5). Appellants were aware of their error at the time of the hearing on the requested amendment (Rep. Tr. 50).

(iii) Leave to amend need not be granted with respect to amendments which would serve no purpose.

The lower court should consider any objections that would defeat the proposed amended claim as a matter of law; otherwise, no purpose would be served by permitting the amendment.

Walker v. Bank of America NT&SA (9th Cir. 1958) 268 F. 2d 16, 26, cert. denied 361 U.S. 903 [Consideration of objection based on statute of limitations in denial of motion to amend.]

Holmes v. Henderson (9th Cir. 1957) 249 F. 2d 529, 530.

Amendment is not a matter of right as suggested by appellants (Brief for Appellants, p. 6). *Cohen v. Gensbro Hotel Co.* (9th Cir. 1958) 259 F. 2d 78, cited by appellants, held that *under the circumstances of that case*, the granting of a *motion to dismiss* was arbitrary and clearly erroneous (at p. 83). In that case, the appellate court simply determined that the defense of equitable estoppel may have been applicable to the facts at hand and defendants were not entitled to judgment as a matter of law.

There are ample grounds on which it can be said that Beaman was entitled to judgment as a matter of law, both as to the two complaints on file (R. 1-7) and the proposed second amended complaint (R. 251-254). See discussion *infra*.

4. APPELLANTS' CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS.

(a) The three-year California statute of limitations is applicable.

No federal statute covers any time limitation on the commencement of private actions under the applicable sections of the 1933 Act, the 1934 Act and/or Rule 10b-5. In such cases, the federal courts adopt and apply the local state law of limitations.

Holmburg v. Ambrecht (1946) 327 U.S. 392, 395, 66 S.Ct. 582, 90 L.Ed. 743.

The three-year California statute of limitations (Code of Civil Procedure §338(4)) is applicable to the case at bar.⁵

Turner v. Lundquist (9th Cir. Apr. 7, 1967) 377 F. 2d 44 is squarely in point. It involved an action under provisions of the federal securities acts which appellants claim to be applicable herein. The court stated (before Hamley and Duniway, Circuit Judges, and Copple, District Judge):

“This action was brought for monetary relief based on alleged violations of Section 10(b) of the Securities Exchange Act of 1934 (15 USC Sec. 78j(b)), Rule X-10B-5 of the Rules and Regulations of Securities Exchange Commission (17 CFR 240, 10B-51); and Section 17(a) of the Se-

⁵The parties, throughout the state and federal court proceedings, have considered only California as the state whose laws would be applicable.

curities Act of 1933 (15 USC Sec. 77q); plaintiff-appellant Turner likewise contends that he is entitled to damages for fraud and deceit under California state law.”

“Since there is no federal statute of limitations applicable to 15 USC §78b and 15 USC §77q, California’s three-year statute [California Code of Civil Procedure, Section 338 (4)] is applicable. *Errion v. Connell* (9th Cir. 1956), 236 F. 2d 447. The lower court so found and counsel for both parties agree that this is the longest period applicable to each count in the complaint.”

“Federal procedure does not require a plaintiff to allege the time and circumstances of the discovery of the fraud in his complaint. However, when the matter is raised on defendant’s motion for summary judgment the plaintiff cannot save his evidence until trial but ‘must sufficiently disclose what the evidence will be to show that there is a genuine issue of fact to be tried.’ *Matute v. Carson Long Institute, D.C.* 160 F. Supp. 827, 832, quoting from *Surkin v. Charteris* (5th Cir.) 197 F.2d 77, 79. See also *Kasey v. Molybdenum Corp. of Amer.* (9th Cir.), 336 F.2d 560, 575.

“In addition, the record reveals, and Turner has not denied, numerous facts which came to his attention prior to May 12, 1961 (three years prior to filing his amended complaint), sufficient in this view of the court to have put him upon notice and inquiry and commenced the running of the period of limitation as a matter of law. . . .” (377 F. 2d at pp. 45-48)

To the same effect:

Errion v. Connell (9th Cir. 1956) 236 F. 2d 447, 455;

Connelly v. Balkwill (DCND Ohio 1959) 174 F. Supp. 49 aff'd 279 F. 2d 865 (6th Cir. 1960);

Dack v. Shanman (SDNY 1964) 227 F. Supp. 26, 29.

See also:

Bromberg, *Securities Law: Fraud* (1967) Sec. 2.5(1) at p. 41.

It is apparent from the findings of fact in the first state court action (See Statement of the Case, *supra* p. 2, footnote (1) and R. 29)⁶ that appellants, no later than December 30, 1961—*well over five years prior to filing their initial complaint in the court below*—knew or should have known of the existence of the facts which form the basis of their claim.

(b) Appellants' alleged claims accrued more than five years prior to filing.

Any causes of action appellants may have had against Beaman with respect to the contract of sale accrued not later than December 30, 1961. All pertinent facts were known to appellants by December 30, 1961. Unquestionably, the judgment in the first state court action was not entered until May of 1965 (Brief for Appellants p. 9) and \$18,733.71 was not paid under such judgment until August of 1967 (Brief for Appel-

⁶See also Sackett's Supplemental Affidavit in Support of Preliminary Injunction (R. 46-48).

lants p. 7). However, these facts are immaterial to the question of the accrual of appellants' claims because:

(i) Appellants, by December 30, 1961, at the latest, could have commenced an action under the federal securities acts requesting return of the purchase price then paid (\$1,000 and the promissory notes) and cancellation of the contract of sale.

Royal Air Properties, Inc. v. Smith (9th Cir. 1962) 312 F. 2d 210, 213; after removal, 333 F. 2d 568 (1964) [A defrauded buyer can sue to rescind.]

Matheson v. Armbrust (9th Cir. 1960) 284 F. 2d 670 [Judgment affirmed for purchaser in an action under Rule 10b-5 to cancel contract of sale and for damages.]

Errion v. Connell, *supra*, [Judgment for stockholder affirmed in an action for cancellation and damages under sections of 1934 Act and Rule 10b-5.]

(ii) Appellants could also have requested damages under an out-of-pocket rule, i.e., the difference between the value of that with which they departed (the down payment and their dollar liabilities under the contract of sale), and that which they received (the stock in News Publishing Co.).⁷

⁷It is difficult to determine what measure of damages appellants are seeking to be applied in their proposed second amended complaint (R. 251). No allegations are set forth as to the value of what appellants received to form the basis of an out-of-pocket measure. The gist of such complaint to some degree suggests a rescission measure, plus the amounts of interest, fees and costs which the judgment in the first state court action awarded to Beaman. Appellants carefully ignore the \$1,000 paid by them in 1961.

California Civil Code §3343 states:

“One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction. . . .”

See

Janigan v. Taylor (1st Cir. 1965) 344 F. 2d 781, 786, cert. denied 382 U.S. 879;

Estate Counselling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (10th Cir. 1962) 303 F. 2d 527, 533;

Graf v. Sumpter (1st Dist. 1962) 207 Cal. App. 2d 391, 393, 24 Cal. Rptr. 590.

“In general, damages for fraud are to be assessed as of the date of the fraudulent transaction (*Hancock v. Williams*, 99 Cal. App. 2d 80, 82 [221 P. 2d 129] *That would be the date of the contract by which plaintiffs' right to the property and their obligation to pay therefor became fixed.*” [Emphasis added]

See, also,

McCue v. Bruce Enterprises, Inc. (4th Dist. 1964) 228 Cal. App. 2d 21, 30, 39 Cal. Rptr. 125.

Appellants argue that under the language of 15 USC §77q a violation occurred in August, 1967, when Beaman obtained “money or property” (\$18,733.71) by means of an *alleged* prohibited statement or omis-

sion to state. (Brief for Appellants, p. 7.) Appellants, of course, ignore the fact that Beaman, in 1961, had received both "money" (\$1,000 down payment) and "property" (the promissory notes) by means of the same alleged prohibited statement or omission to state, albeit, without the formal aid of the California Superior Court.

Beaman simply obtained the \$18,733.71 by judicial decree. It would be ludicrous to conclude (as appellants have argued) that the money paid under a valid state court judgment gives rise to a cause of action.^{7a} The court, in *Key Broadcasting System Inc. v. Griffith* (1953) 119 NYS 2d 174, 175 (Brief for Appellants, p. 8) describes such a situation as "anomalous" but by no means suggests it as a legal possibility; moreover, the court was simply applying the well recognized rule that statutes of limitations in general do not run against defensive relief.

See

1 *Witkin, California Procedure* §95 at pp. 600-601.

It follows that appellants' claims against Beaman, whether founded on the federal securities acts or otherwise accrued not later than December 30, 1961, are time barred.

^{7a}The court below stated:

"On that theory, every time the defendant in a lawsuit involving a personal injury loses it, he acquires damages as of the time the judgment is rendered . . . which, if improperly reached, creates a cause of action for damages." (Rep. Tr. p. 50.)

5. FINAL JUDGMENT IN THE FIRST STATE COURT ACTION CONSTITUTES A BAR BY REASON OF RES JUDICATA.

Since identity of parties and the entry of a final judgment in the state action are unquestionably present, the only element of res judicata which might legitimately be in doubt is that as to identity of issues.

See

McManus v. Bendlage (2nd Dist. 1947) 82 Cal. App. 2d 916, 922, 187 P. 2d 854 (discussing the three pertinent questions in determining the validity of a plea of res judicata).

The existence of an action based on the federal securities acts does not mean per se a different cause of action from an action in a state court based on the same facts. This is true even though 15 USC §78aa vests exclusive jurisdiction in the District Courts.

Connelly v. Balkwill (D.C.N.D. Ohio 1959) 174 F. Supp. 49, 56, aff'd 279 F. 2d 685 (6th Cir. 1960).

“Thus, while the courts of the several states have jurisdiction to determine actions based on fraud connected with the purchase or sale of securities, they have no jurisdiction in cases involving violations of Rule X 10b-5 which include the direct or indirect use of interstate facilities, the mails or the facilities of national security exchanges. It does not follow, however, that an action in Federal Court under Rule X 10b-5 is necessarily a different cause of action than an action in the state court based upon the same facts. The use of interstate facilities, the mails or the facilities of national security exchanges is not

per se a violation of Rule X 10b-5. Standing alone, the use of such facilities gives rise to no cause of action. The federal cause of action arises upon operative facts that disclose a violation of the provisions of the rule designed to insure fair dealing in connection with the sale and purchase of securities. While there has been no definitive determination of the boundaries of Rule X 10b-5, the better reasoned view is that—facts which would sustain a common law action for fraud might also constitute a cause of action under Rule X 10b-5 but not all cases arising under the rule would constitute a common law action for fraud. In *Beury v. Beury*, 127 F. Supp. 786, the District Court expressed the opinion that Section 10 of the Act conferred jurisdiction to entertain only those actions which involve a right of recovery which goes beyond common law rights. Although the appeal in that case was not from a final order and for that reason was dismissed, the Court of Appeals gratuitously expressed its disagreement with the above view of the trial judge. *Beury v. Beury*, 4 Cir. 22 F. 2d 464, at page 465. In *Loss on Security Regulations*, at 819, the author says: ‘The extent to which the Security Exchange Acts go beyond common law fraud depends upon the particular common law jurisdiction.’ Plaintiffs concur in this view and concede that in some jurisdictions the duty of disclosure under state law is no less strict than the duties imposed by Rule X 10b-5.

“To determine whether this case and the previous one are based upon the same cause of action, it is necessary first to ascertain the principles that govern actions of fraud in Ohio. . . .”

The District Court continued, after the foregoing quote, with an extensive discussion of fraud actions under Ohio law, concluding that the duty to disclose material facts under Ohio law is as broad and exacting as the duty of disclosure defined by Rule 10b-5.

Under California law, deceit may be negative as well as affirmative. It may consist of suppression of that which is one's duty to disclose as well as by declaration of that which is false, e.g., *Lingsch v. Savage* (1st Dist. 1963) 213 Cal. App. 2d 728, 735, 29 Cal. Rptr. 201.

The principle of disclosure is not confined to fiduciaries, having application to other relationships, e.g., vendor-vendee.

SanFran Co. v. Rees Blow Pipe Mfg. Co. (1st Dist. 1959) 168 Cal. App. 2d 191, 207, 335 P. 2d 995.

Nor does the law of California countenance half truths.

Calif. Civil Code §1710(3);

American Trust Co. v. California Western States Life Ins. Co. (1940) 15 Cal. 2d 42, 65, 98 P. 2d 497.

Generally, the question is stated in 23 Cal. Jur. 2d 5, as follows:

"Fraud in California is so broad and assumes so many shapes that courts are cautious in attempting to define it."

See also Calif. Corporations Code §3018.

It seems unnecessary to launch an extended discussion of the rules of fraud in California. In light of the foregoing considerations, California must be assigned a place among those “‘more enlightened jurisdictions’ where the duty to disclose material facts is as broad and exacting as the duty of disclosure defined by Rule X 10b-5.” (*Connelly v. Balkwill*, supra, 174 F. Supp. at p. 60, wherein Ohio was the subject of such quotation.)

The rule of *res judicata* is designed to prevent vexatious litigation and to require litigants to rest on one decision which includes not only matters actually determined by judgment, but also every other matter which the parties might have litigated as an incident thereto or essentially connected with the subject matter of the litigation, both in respect to matters of claim and of defense.

Panos v. Great Western Packing Co. (1943) 21 Cal. 2d 636, 637-638;

Holman v. Holman (4th Dist. 1938) 25 Cal. App. 2d 445, 452, 77 P. 2d 515.

See *Brunswick Drug Co. v. Springer* (2d Dist. 1942) 55 Cal. App. 2d 444, 449-50:

“A party cannot by *negligence* or *design* withhold issues and litigate them in consecutive actions” (emphasis added).

Purported violations of the federal securities acts could have been raised by appellants as a defense to Beaman’s complaint in the first state court action,

notwithstanding exclusive federal jurisdiction of actions under the 1934 Act and Rule 10b-5.⁸

Southern Brokerage Co. v. Cannosara (Tex. Civ. App. 1966) 405 SW 2d 457, error ref. NRE, cert. denied 386 U.S. 1004;

Key Broadcasting System, Inc. v. Griffith (1953) 119 NYS 2d 174 (cited in Brief for Appellants p. 8).

See *Red Rock Cola v. Red Rock Bottlers* (5th Cir. 1952) 195 F. 2d 406 (A state court has jurisdiction in suit on contract over a defense based on federal anti-trust laws.)

See, also, 1A *Moore's Federal Practice* (2d edition) ¶10.208[4] at p. 2325.

6. APPELLANTS ARE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

In *Connelly v. Balkwill*, supra, the District Court determined that if res judicata were not a bar because more than one cause of action were involved, nevertheless, the plaintiffs therein were barred by the related doctrine of collateral estoppel (174 F. Supp. at pp. 60-61):

“The doctrine of collateral estoppel, which is a narrowed version of res judicata, is based upon the principle that—

⁸State courts have concurrent jurisdiction of claims under purported violations of 15 USC §77q. See 15 USC §77v.

‘Where a fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.’ (Restatement of Judgment §68, p. 293)

“The distinction between *res judicata* and collateral estoppel is delineated clearly in *United States v. International Building Co.*, 345 U.S. 502, at pages 504-505, 73 S.Ct. 807, 808, 97 L.Ed. 1182:

‘The governing principle is stated in *Cromwell v. County of Sac.*, 94 U.S. 351-352-353, 24 L.Ed. 195. A judgment is an absolute bar to a subsequent action on the same claim.

“‘But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the findings or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.’”

The court concluded that plaintiffs specifically were estopped by the state court judgments from again raising the issue of the materiality of certain nego-

tiations, since the state court had held that they were immaterial (174 F. Supp. at p. 62). Such argument has equal application to our facts if we assume (but not concede) that the action under the federal securities acts is a different cause of action from a fraud suit under California law.

Materiality and reliance are carried over from common law fraud actions to actions under the federal securities acts.

Janigan v. Taylor (1965) 344 F. 2d 781, Cert. denied 382 U.S. 879;

List v. Fashion Park, Inc. (1965) 340 F. 2d 457, Cert. denied 382 U.S. 811.

The findings in the first state court action clearly reflect that the subject contract was not executed under a material mistake and that such contract was not void for material mistake or for fraud (R. 29). In the words of Justice Molinari, who wrote the unanimous opinion affirming the judgment of the trial court in the first state court action (R. 229-230):

“Accordingly, upon the basis of the evidence adduced, which was favorable to plaintiff, the trial court could reasonably conclude that the mistake contained in the profit and loss statement was neither a material mistake nor one that induced defendant to enter into the contract, but that defendant made his decision to purchase stock in News Publishing Company primarily upon the basis of his close relationship with de Menzes, as to whom defendant had great respect, his belief that Portsmouth was a promising area

for a newspaper, and the favorable impression he received of the newspaper itself from examining back copies.”^{8a}

Thus, assuming (but not conceding) that a mistake, other act or omission might be material under the federal securities acts but not under California law relative to fraud, the finding in the first state court action that Sackett and KVAN did not rely on any mistake, other act or omission is sufficient to bar the instant action.

It is painfully clear that plaintiffs are simply attempting to relitigate issues which were carefully considered in the first state court action. More remarkable is the reference by appellants to an alleged \$37,612.34 operating loss as of October 31, 1961, alleged to have been suffered by News Publishing Company (Brief for Appellants, p. 2). The record in the first state court action “is devoid of evidence showing the newspaper’s financial position after August 24, 1961.” (R. 234)

Sackett chose not to submit in the first state court action any evidence of the corporation’s financial condition after August 24, 1961. It was the duty of Sackett and KVAN, at the trial in the first state court action, to tender each item of evidence tending to support their claims. Where they failed to do so, they are foreclosed from such action at trial of a subse-

^{8a}de Menzes was the major stockholder, president, general manager, director of News Publishing Company and a long time friend of Sackett (R. 229).

quent suit, and a claim that they have never had their day in court cannot be sustained.

Ernsting v. United Stages, Inc. (1929) 209 Cal. 733, 276 P. 103;

Bank of America v. McLaughlin (1937) 22 Cal. App. 2d 411, 71 P. 2d 291, 72 P. 2d 554;

Denio v. Huntington Beach (1946) 74 Cal. App. 2d 424, 431-32, 168 P. 2d 785.

7. APPELLANTS ARE BARRED BY LACHES.

Apart from any consideration of a state statute of limitations, the doctrine of laches is applicable to bar appellants' claim.

Royal Air Properties, Inc. v. Smith (9th Cir. 1962) 312 F. 2d 210, 214;

Trussell v. United Underwriters, Limited (D.C. Colo. 1964) 228 F. Supp. 757, 776;

See: *Bromberg, Securities Law: Fraud* (1967) Sec. 11.5 at p. 253.

The findings of the court below (R. 264, line 20 to R. 265, line 10) supporting its conclusion of laches (R. 265, lines 24-27) have not been specified as error in appellants' brief.⁹

Rule 18(1)d, *Rules of the United States Court of Appeals for the Ninth Circuit*.

⁹In fact, none of the findings of the court below have been specified as error in appellants' brief.

Consequently, such findings are not in issue and are not discussed herein.

Rule 18(3), *Rules of the United States Court of Appeals for the Ninth Circuit.*

In no measure were appellants "encased" (Brief for Appellants, p. 18) in a state court with respect to their rights under the federal securities acts *except by their own inaction*. Upon commencement of the first state court action by Beaman, appellants could have:

(i) defended, *inter alia*, on the grounds of alleged violation of the federal securities acts. (See discussion, *supra*, pp. 20-21)^{9a}; or

(ii) commenced an action in the Federal District Court based on an alleged violation of the federal securities acts, requesting, alternatively, (a) rescission and return of moneys paid and property delivered, or (b) consequential damages. (See discussion, *supra*, p. 14.) To avoid piecemeal litigation, appellants at the same time could have requested the Federal District Court to exercise pendent jurisdiction over the non-federal issues in the first state court action.

Hurn v. Oursler (1933) 289 U.S. 238, 246, 53 S.Ct. 586;

See 1 *Moore's Federal Practice* ¶10.60[1] at p. 602.

^{9a}The record in the second state court action will show that appellants did plead violations of the federal securities acts as defensive matter (answer and cross-complaint of Sackett and KVAN, p. 6, line 29 to p. 7, line 22). While few of the documents

In non-constitutional cases and in the absence of special circumstances, a federal court having jurisdiction should normally proceed to an adjudication of both state and federal issues.

County of Alleghany v. Frank Mashuda Co. (1959) 360 U.S. 185, 79 S.Ct. 1060, reh. denied 361 U.S. 855;

Propper v. Clark (1949) 337 U.S. 472, 489, 490-491, 492, 69 S.Ct. 1333;

See *Ballantine Brooks, Inc. v. Capital Distributing Co.* (2d Cir. 1962) 302 F. 2d 17, 19 (A federal court is not required to abate the normal *in personam* action on a plea of a pending action in a state court.)

See, also, 1A *Moore's Federal Practice* ¶10.203 [2] at p. 2123.

Thus, appellants were in no wise prevented from litigating the federal questions in a federal court upon discovery in 1961 of the facts giving rise to a purported claim under the federal securities acts.

8. REPLY TO MISCELLANEOUS POINTS RAISED BY APPELLANTS.

(a) Appellants' Statement of the Case.

None of the alleged factual matters set forth in appellants' Statement of the Case (Brief for Appellants, pp. 2-4) is supported by reference to the record, ex-

in such action are a part of the record on appeal herein, their existence and contents may be judicially noticed. *Shapleigh v. Mier* (1937) 299 U.S. 474, 81 L. Ed. 355, 359.

cept for two items under the heading "The Federal Suit" (Ibid. p. 4).¹⁰

Rule 18(2)C, *Rules of the United States Court of Appeals for the Ninth Circuit*.

Appellants' sketchy "Factual Background" (Brief for Appellants) attempts to create an impression that Sackett did not get what he fairly and openly bargained for. The findings of the first state court action negate any such impression (R. 28-29).

In reference to the findings in the first state court action, appellants speak of the "*now*"¹¹ conceded falsity of" a financial statement as though any such concession occurred after judgment in such action. Clearly the fact (a calculation error) was before the trial court in such action (R. 227). Clearly the California appellate court felt there was substantial evidence to support the findings favorable to Beaman (R. 233).

The statement of appellants (their brief p. 4) that the judgment in the first state court action was satisfied is not correct (see Brief for Appellants p. 3 for a contrary statement).

(b) The Contention as to a Suspension of the Statute of Limitations.

Appellants argue that because of the California election of remedies doctrine, they were prevented

¹⁰Appellants refer to an assignment to Fidelity and Deposit Company of Maryland for security purposes. (Brief for Appellants, p. 3) Such a fact (its accuracy is unknown to us) is outside of the record and immaterial to a determination of this appeal.

¹¹Our emphasis.

from suing for damages in the federal court and thus the running of any statute of limitations is suspended (Brief for Appellants, pp. 11-12).

Appellants' authorities (Brief for Appellants, p. 12) support a rule of reason which would suspend an applicable statute of limitations whenever there was a *prevention* of a trial on the merits.

See, 1 *Within California Procedure* § 165, at pp. 674-675.

It should be noted first that the choice of remedies in the state court which appellants contend would block their claim for damages in the federal court was their own—not Beaman's. Clearly, there is a common sense qualification to any rule suspending a statute of limitations which would exclude a prevention *resulting from the act or omission of the party claiming a suspension*. None of appellants' authorities suggests that a suspension would be appropriate under the circumstances of this case.

In any event, appellants' statement of California law as to election of remedies and its application herein is incorrect. California Civil Code § 1692 provides:

“When a contract has been rescinded in whole or in part, any party to the contract may seek relief based upon such rescission by (a) bringing an action to recover any money or thing owing to him by any other party to the contract as a consequence of such rescission or for any other relief to which he may be entitled under the circumstances, or (b) asserting such rescission by way of defense, counter-claim or cross-complaint.

“If in an action or proceeding a party seeks relief based upon rescission and the court determines that the contract has not been rescinded, the court may grant any party to the action any other relief to which he may be entitled under the circumstances.

“A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled; but such relief shall not include duplicate or inconsistent items of recovery.

“If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties.” (Emphasis added)

The purpose of such statute is obviously to prevent duplicate or inconsistent relief. Since appellants could have added a cause of action for damages in the first state court action, a fortiori, they could have filed such an action in the federal courts without being met with a contention that their claim for rescission had been abandoned.

Williams v. Marshall (1951) 37 Cal. 2d 445, 457, 235 P. 2d 372.

Nothing prevented a trial on the merits in the federal court. (See discussion, *supra*, at p. 26.)

(c) The Contention That a Federal Court Is Not Bound to Apply the State Statute of Limitations.

Appellants assert that federal courts are not bound to apply a state statute of limitations where "in a proper case it would defeat the assertion of federal rights," citing *Fischbach & Moore, Inc. v. Int'l Union* (SD Calif. 1961) 198 F. Supp. 911 (Brief for Appellants, p. 13).

Fischbach & Moore, supra, involved an action for damages arising out of unfair labor practices by labor unions. The alleged activities occurred more than three, but less than five, years before the action was filed. The court reached its decision to ignore any state limitations on the basis of the *Lincoln Mills* case, 353 U.S. 447, 77 S.Ct. 912, which clearly expressed a policy as to the Labor Management Act, i.e., that federal courts were bound to apply not state substantive law, but federal substantive law to be fashioned from the policy of national labor laws (198 F. Supp., at p. 913).

Appellants' assertion simply ignores the several federal court decisions which have determined that state statutes of limitations are to be applied in actions under the federal securities acts where no federal provision has been made therefor.

Turner v. Lundquist, supra, and other cases cited in the discussion, supra, p. 11.

In any event, the court stated in *Fischbach & Moore, Inc.*, supra (198 F. Supp., at p. 915):

"... as a practical matter the equitable doctrine of laches may be utilized to preclude re-

covery in any case where it appears that the plaintiff has delayed unnecessarily in asserting his claim. . . ."

(d) Application of *England v. Louisiana Medical Examiners*.

Appellants rely exclusively on *England v. Louisiana State Bd. of Medical Examiners* (1964) 375 U.S. 411, 84 S.Ct. 461 as authority for their contention that there was error in holding appellants' claims were barred by res judicata and collateral estoppel (Brief for Appellants, pp. 15-20).

The plaintiffs in *England* were graduates of chiropractic schools seeking to practice in Louisiana without complying with a Louisiana state statute. Action was commenced in the local federal district court seeking an injunction and a declaration that the state statute as it applied to them was unconstitutional. That court invoked the abstention doctrine and entered an order staying further proceedings therein until Louisiana courts had an opportunity to determine certain issues, with an express reservation of jurisdiction; and plaintiffs then brought an action in the Louisiana courts to determine whether the state statute applied to them. It was in the latter proceeding that plaintiffs argued the federal constitutional question, and lost.

Next, plaintiffs returned to the Federal District Court for a determination of their constitutional claim. The United States Supreme Court held that the state court proceedings were not a bar to the constitutional question.

The facts in *England*, *supra*, are far different from ours:

1. Appellants did not go to the federal court in the first instance. Thus, they did not invoke federal jurisdiction and become compelled to go to the state court by order of the federal court.

2. No questions of constitutionality are involved. Thus, there would have been no necessity for application of the doctrine of abstention. (See discussion, *supra*, p. 27.)

3. Appellants were free to commence an action in the Federal District Court on the federal claims. Thus, they were not free from fault in accepting a state court's determination of their claims. (See discussion, *supra*, at p. 26.)

Furthermore, it is clear under the federal removal statutes (28 USC §§ 1441-1450) and discussions interpreting them, that in absence of a fraudulent purpose to defeat removal, a plaintiff may, by the allegations of his complaint, determine the status with respect to the removability of a case. This power to determine removability continues with the plaintiff throughout the litigation. Thus, the avowed helplessness of appellants to remove (Brief for Appellants, p. 19) is nothing new or different; nor is it a cause of sustaining their contentions.

Great Northern Railway Co. v. Alexander
(*Hall's Adm'n*) (1918) 246 U.S. 276, 282, 62
L.Ed. 713;

1A *Moore's Federal Practice*, ¶0.160 at p. 473.

CONCLUSION

Any deprivation of a chance to *assert* a federal remedy which appellants have suffered has been effected by appellants through their own acts or omissions.

Wherefore, Beaman respectfully submits that the judgment of the court below should be affirmed.

Dated, San Francisco, California,
February 15, 1968.

Respectfully submitted,
RUDOLPH J. SCHOLZ,
EVERETT S. LAYMAN, JR.,
Attorneys for Appellee
J. Frank Beaman.

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and, in my opinion, the foregoing brief is in full compliance with these rules.

EVERETT S. LAYMAN, JR.,
Attorney.

No. 22,182
United States Court of Appeals
For the Ninth Circuit

SHELDON F. SACKETT, and KVAN, INC.,
a Washington corporation,

Appellants,

VS.

J. FRANK BEAMAN, and FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, a
corporation,

Appellees.

REPLY BRIEF FOR APPELLANTS

NATHAN S. SMITH,

JAMES G. SEELY, JR.,

220 Bush Street - Suite 976,

San Francisco, California 94104,

Attorneys for Appellants.

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United States Court of Appeals For the Ninth Circuit

SHELDON F. SACKETT, and KVAN, INC.,
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Appellants,

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Appellees.

REPLY BRIEF FOR APPELLANTS

The most striking aspect of Appellee's Brief is its failure to suggest any reasonable course of action Appellants might have taken concerning their Federal claims other than waiver of their right to present such claims in Federal court.¹ Appellee concedes that when he filed the State action Appellants had no right of removal. He nevertheless suggests that Appellants could have "commenced an action in the Federal Dis-

¹Appellee's suggestion that the Federal claims might have been raised defensively in State court fails to meet the issues presented on this appeal. Appellants did not wish to litigate their Federal claims in State court. In view of Congress' grant to Federal courts of *exclusive jurisdiction* of actions under the Securities Exchange Act of 1934, it is clear they were not required to do so.

trict Court based on an alleged violation of the federal securities acts . . ." (Brief for Appellee, p. 26). Yet he argues at the same time that the Federal claim is essentially the same claim as that which was litigated in the State action. If Appellee is correct in this position, he is suggesting that Appellants should have engaged in an exercise in futility, for, under Appellee's theory, judgment in the State action, if prior to judgment in the Federal action, would have barred further proceedings in the Federal action on principles of *res judicata*. Appellee's suggestion thus boils down to a conception that the parties should have engaged in simultaneous litigation in State and Federal courts of corresponding State and Federal claims, with the parties undertaking a race to judgment. Under this theory the first court to reach judgment would prevail over the other.² Clearly, a less whimsical approach to the administration of justice under a Federal system exists.

In our view, the procedure adopted by Appellants was both appropriate and reasonable. Immediately

²Appellants could not have protected themselves by filing suit in Federal court and withholding service of process. *Moore Co. of Sikeston, Missouri v. Sid Richardson Carbon & Gasoline Co.* (E.D. Mo. 1964) 237 F.Supp. 817 (although complaint filed within limitation period, action barred by statute of limitation where counsel failed to use due diligence to serve process). Having filed suit in Federal court, they would have been under a duty to prosecute it with diligence. Rule 41(b) Federal Rules of Civil Procedure (defendant may move for dismissal if plaintiff fails to prosecute). Rule 11, Rules of Civil Practice, United States District Court, Northern District of California (each quarter Calendar Judge shall call a convenient number of cases wherein no Memorandum to Set has been filed upon order to show cause why they should not be dismissed for lack of prosecution).

upon discovery of Appellee's fraud, they rescinded the contract under California law by notification to Appellee. When Appellee sued shortly thereafter, Appellants defended and cross-complained on the basis of their rescission and their corresponding right to restitution of the \$1,000 down payment. At this point their rescission was effective under California law; no further legal action on their part seemed necessary.³

If Appellants were mistaken in believing that on those facts they would obtain relief in the California courts, it was a reasonable and excusable mistake. Appellee has himself cited cases which indicate that at the time the State court action was pending, California law did provide relief in such situations.⁴ See Brief for Appellee, page 19. Appellants should not be penalized for a reasonable mistake particularly where, as here, their opponent makes the same error. See *England v. Louisiana State Board*, 375 U.S. 421 (rule enunciated by the court held inapplicable to

³Appellants understandably felt that relief would be forthcoming in the California courts. Appellee had sold closely-held corporate stock to Appellants on the basis of a financial statement *which he prepared* showing the company had a profit of \$5,285 when it had actually lost over \$37,000.

⁴Appellee even now goes far beyond this contention and argues that under California law the duty of disclosure is as broad as that under Rule 10b-5. This argument is, of course, totally refuted by the opinion dated March 27, 1967, in *Beaman v. Sackett*, 1 Civil No. 23,182, Court of Appeal, State of California, First Appellate District, Division One (unpublished opinion) (C.T. 219):

"In any event, regardless of plaintiff's status in the corporation, he owed no duty to defendant to disclose information. . . ." (C.T. 234.)

A comparison of this opinion with *Ellis v. Carter* (9th Cir. 1961) 291 F.2d 270 makes this abundantly clear.

Appellants because their conduct was reasonable under the circumstances). In any event, Appellants' conduct does not justify a total forfeiture of their Federal claims.

From December 1961, when Appellants rescinded the contract until May 1965, when the California court entered judgment, the necessity for a Federal action was wholly contingent upon the remote chance that the State suit might be ineffective. Appellants' claim for damages under Federal law, so tenuous and contingent, was too remote and uncertain to support a Federal damage action prior to May 1965, when the State court made its ruling.⁵

Under such circumstances Federal courts are not required to apply the bar of limitations in hidebound fashion. [See *Fishbach & Moore, Inc. v. Int'l Union* (S.D.Cal. 1961), 198 F.Supp. 911, discussed in Brief for Appellants at pp. 13-14]. Rather, they look to the realities or substance of a claimed bar. Thus, in *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965), the Supreme Court was presented with the question of the applicability of the three-year F.E.L.A. statute of limitations to a Federal action that was commenced over three years after the cause of action had accrued; the same cause of action, timely filed, in a State court had been previously dismissed by that court. The

⁵Appellee suggests that the existence of Appellants' claim to \$1,000 on principles of restitution evidences damage sufficient to start the Federal limitation period. This suggestion ignores the repugnancy between restitution and damage claims. Furthermore, the \$1,000 represented only 4% of the purchase price. Viewed in proportion to the entire transaction, it was *de minimis*.

Burnett court conceded that the F.E.L.A. statute of limitations was applicable but held that it was tolled for the period of the pendency of the State court action and until the State court dismissal order became final. The *Burnett* court stated that the basic inquiry is whether Congressional purpose is effectuated by tolling the statute in given circumstances and that examination of the purposes and policies underlying the limitation provision and the substantive act itself were relevant in determining such intent. The court then observed (at pp. 428-430):

“Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes ‘promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.’ Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349 [64 S.Ct. 582, 586, 88 L.Ed. 788]. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights [footnote omitted].

“This policy of repose, designed to protect defendants, is frequently *outweighed*, however, where the interests of justice require vindication of the plaintiff’s rights. * * *

“* * * Petitioner here did not sleep on his rights but brought an action within the statutory period

in a state court of competent jurisdiction. Service of process was made upon the respondent notifying him that petitioner was asserting his cause of action. While venue was improper in the state court, under Ohio law venue objections may be waived by the defendant [footnote omitted], and evidently in past cases defendant railroads, including this respondent, had waived objections to venue so that suits by nonresidents of Ohio could proceed in state courts [footnote omitted]. Petitioner, then, failed to file a FELA action in the federal courts, not because he was disinterested, but *solely because he felt that his state action was sufficient*. Respondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy; in fact, respondent appeared specially in the Ohio court to file a motion for dismissal on grounds of improper venue." (Emphasis added.)

If Appellants have slept on their rights in this case, it has been a fitful sleep. The controversy has been intensely and vigorously litigated since its inception by Appellee. In no conceivable sense has Appellee been surprised "through the revival of claims that have been allowed to slumber." On the contrary, Appellee has had every reason to believe that Appellants would pursue all avenues available in their search for justice. It cannot be a surprise that Appellants relied first on State court remedies which they believed to be sufficient and which they were required to present when Appellee sued them in State court. Nor can it be a surprise that when relief was denied

Appellants in State court, they promptly and vigorously prosecuted the Federal remedies which thereupon became actionable.

CONCLUSION

As previously shown, Appellants' Federal claim did not accrue until May 1965 when they first suffered damage as a result of Appellee's conduct. Their action in the court below was therefore timely under any view of the case. Furthermore, even if their claim accrued in 1961, as Appellee contends, the circumstances of this case and the interests of justice require that the statute of limitations be tolled during pendency of the State court litigation.

Clearly Congress never intended that the Federal remedies it established for shady securities transactions be frustrated in the manner here employed by Appellee.

Dated, San Francisco, California,

April 2, 1968.

Respectfully submitted,

NATHAN S. SMITH,

JAMES G. SEELY, JR.,

Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN S. SMITH,
Attorney for Appellants.

See Vol. 3434

Nos. 21,296 and 22,183

**United States Court of Appeals
For the Ninth Circuit**

ANNA L. SANCHEZ,

Appellant,

VS.

KANO KAWAMURA,

Japanese Consulate, et al.,

Appellee.

BRIEF FOR APPELLEE

SEDGWICK, DETERT, MORAN & ARNOLD,

By P. BEACH KUHLM,

111 Pine Street,

San Francisco, California 94111,

Attorneys for Appellee.

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Nos. 21,296 and 22,183

United States Court of Appeals
For the Ninth Circuit

ANNA L. SANCHEZ,

Appellant,

vs.

KANO KAWAMURA,

Japanese Consulate, et al.,

Appellee.

BRIEF FOR APPELLEE

STATEMENT OF FACTS

On November 26, 1965, plaintiff filed a complaint in the United States District Court, seeking damages for personal injuries. She alleged that Kano Kawamura, a vice-consul of Japan, so negligently operated a motor vehicle owned by himself, the Japanese Consulate and certain Doe defendants, bearing license No. Consular Corps 193, that it struck and injured plaintiff on September 1, 1964 in the City and County of San Francisco. Appellee moved for a dismissal of the action on the ground that it was barred because it was not filed within one year after the accrual of the cause of action. On July 5, 1966 the District Court granted the motion and on July 26, 1966 judgment of dismissal was entered. On July 19, 1966 appellant filed

her Notice of Appeal from the Order Granting Motion to Dismiss. The record on that appeal (No. 21296) was duly prepared and filed with this court on August 24, 1966. The appeal was docketed on September 23, 1966.

On March 28, 1967, appellant filed in the District Court her Notice of Motion for Order Vacating Judgment of Dismissal. On May 2, 1967, the District Court denied the motion to vacate the dismissal. Appeal No. 22183 was taken from that Order.

QUESTIONS PRESENTED

The question raised in appeal No. 21296 is whether California's one year statute of limitations applies to an action for personal injuries suffered in California which is brought against a vice-consul of a foreign country in federal district court.

The question raised in appeal No. 22183 is whether the district court abused its discretion in denying appellant's motion to vacate the dismissal.

SUMMARY OF ARGUMENT

The reasons why the California one year statute of limitations applies to this case were set out in appellee's brief filed in appeal No. 21296, and the court's attention is respectfully directed to that brief.

In appeal No. 22183 appellant contends that her Motion to Vacate Judgment of Dismissal should have

been granted. A motion for such relief under Rule 60(b) is addressed to the court's discretion, and will not be reversed unless the record shows an abuse of discretion. The end of providing expeditious and conclusive terminations of litigation should not be set aside for a litigant who first chooses to appeal a judgment and later, after long delay and without offering any reason therefor, seeks to have that judgment vacated. Appellant failed to present any facts in support of her motion to justify granting the relief sought. Consequently, there was no abuse of discretion and the motion was properly denied.

The record shows no facts other than the filing, more than a year after the cause of action accrued, of a personal injury lawsuit.

ARGUMENT

- I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO VACATE THE DISMISSAL.
- A. A Motion Under Rule 60(b) Is Addressed to the Discretion of the Court.

The determination of whether to grant or deny a motion for relief under Rule 60(b) involves a discretionary appraisal of the facts of the particular case.

7 *Moore's Federal Practice*, §60.19;

Assman v. Fleming (CCA 8th, 1947) 159 F.2d 332;

Ledwith v. Storkan (D. Neb. 1942) 6 F.R. Serv. 606.24, Case 2, 2 F.R.D. 539.

Such discretionary action will not be lightly interfered with by an appellate court.

Nederlandsche Handel-Maatschappij N. V. v. Jay Emm, Inc. (CA 2d 1962) 301 F.2d 114.

Appellant concedes that the trial court's ruling on such a motion should be reversed only on a showing of abuse of discretion.

Appellant's Opening Brief (appeal No. 21296),
Page 4.

B. The Record Shows That There Was No Abuse of Discretion by the District Court.

A review of the record shows that the original order granting dismissal was filed on July 5, 1966. Appellant chose to stand on her claim that some longer period than the one-year statute of limitations applied to her bare personal injury complaint. She took an appeal from the order of dismissal on the record as it stood, rather than seeking leave to file an amended complaint. She filed her notice of appeal on July 19, 1966, the record on appeal was filed and the matter docketed in this court.

Some nine months later, appellant or her counsel had second thoughts about the choice they had made. They decided that a different strategy should have been followed. A notice of motion to vacate the dismissal was thus filed on March 28, 1967.

Rule 60(b) is not intended to provide a litigant relief from his or her own considered, deliberate choice of the manner in which to proceed when hindsight

suggests that the choice originally made may not have been a wise one.

Ackermann v. United States (1950) 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207.

The record does not clearly indicate which of the several grounds for relief appellant intended to urge. The "Statement of Reasons and Memorandum of Points and Authorities" mentions mistake or inadvertence and newly discovered evidence. Clerk's Transcript in appeal No. 22183, Page 4. However, no showing of any facts to support any grounds for relief was made. To the contrary, the affidavit of Victor J. Van Bourg shows that appellee's status as a vice-consul was known to appellant before she ever filed her original complaint in the District Court (and in fact that complaint itself alleges that appellee was a vice-consul.) No facts showing any mistake, inadvertence or newly discovered evidence were presented to the court in support of the motion.

Subdivision (6) of Rule 60(b) allows granting of relief for "any other reason justifying relief." As commentators have pointed out, there must be some showing of *justification* for the relief.

7 *Moore's Federal Practice* 295.

Appellant made no showing to justify such relief. Absolutely no reason was offered for the failure to seek leave to file an amended complaint when the original order of dismissal was made. Nor was any justification offered for delaying nine months, or any evidence presented of anything which had occurred during that period which justified relief. If anything,

it would appear that *granting* the motion to vacate would have been an abuse of discretion.

Without some showing of justification, the District Court had no choice but to deny the motion to vacate the judgment. Appellant contends that *denial* of that motion was an abuse of discretion; quite the contrary, in the absence of any showing, *granting* the motion would have been an abuse of the court's discretion.

The conclusion seems inescapable that, in the absence of any showing of reasons why only a bare negligence complaint was initially filed, and nothing was done to amend the complaint until nine months after the first of the two present appeals was taken, the District Court's ruling was within its discretion, and in fact was the only ruling justified by the record.

II. POLICIES FAVORING ORDERLY ADMINISTRATION OF JUSTICE SUPPORT THE DENIAL OF BOTH OF PLAINTIFF'S APPEALS.

The policies behind finality of judgment and expeditious decision of controversies require that judgments not be set aside except for good reason.

In order for justice to be administered in an orderly fashion, litigation must terminate at some reasonable time. If courts are to perform their function of settlement of private disputes, then their judgments must be conclusive of the matters submitted to them for decision.

Southern Pacific R.R. Co. v. United States
(1897) 168 U.S. 1, 18 S.Ct. 18, 42 L.Ed. 355.

Perhaps as necessary as providing *conclusive* disposition of private disagreements by finality of judgments is the providing of *expeditious* disposition of such disputes by efficient administration of justice.

Neither of these goals should be permitted to stand in the way of justice; on the other hand, the benefits arising from finality and expeditiousness should not be undermined by permitting a litigant who has chosen to take an appeal from a judgment to reopen the judgment while the appeal is still pending long after its entry without showing a good reason for doing so.

III. NO BASIS IS DEMONSTRATED FOR TOLLING THE APPLICABLE CALIFORNIA STATUTE OF LIMITATIONS.

Appellant, in both her Opening Brief in appeal No. 21296 and in her Opening Brief on Consolidated Appeals, contends that the record justified tolling the one year statute of limitations. But no facts justifying such tolling appear from the record. It is uncontroverted that appellant filed her complaint more than one year after the accident. She now says, that the complaint was "ineptly pleaded." Appellant's Opening Brief (appeal No. 21296), Page 5. Following this dismissal, she chose to stand on that complaint, and on her contention that some limitation other than one year applied to the case and took the first of these two appeals on that basis.

Nine months later, without offering any reason for not having pleaded additional facts in her original

complaint or for not having sought leave to amend it, she sought leave to have the dismissal vacated. The motion was denied and appellant took the second of these appeals.

The record brought by appellant before this court is simply one of an action for personal injuries filed more than one year after the cause of action accrued.

As such, in the interests of orderly operation of the judicial system, at both the trial and appellate levels, the two appeals should be rejected.

Dated, San Francisco, California,
January 5, 1968.

SEDGWICK, DETERT, MORAN & ARNOLD,
By P. BEACH KUHL,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

P. BEACH KUHL,
Attorney for Appellee.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22184 ✓

JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD., a foreign
corporation,

Defendant and Third Party
Plaintiff-Appellant,

v.

WAYNE CRAWFORD,

Plaintiff-Appellee,

BRADY HAMILTON STEVEDORE
COMPANY, a corporation,

Third Party Defendant-
Appellee.

FILED

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APPELLANT'S BRIEF

Appeal from the Final Judgment of the United
States District Court for the District of Oregon.

THE HONORABLE ROBERT C. BELLONI, Judge

King, Miller, Anderson, Nash & Yerke
Curtis W. Cutsforth
1200 American Bank Building
Portland, Oregon 97205

Attorneys for Appellant

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No. 22184

IN THE UNITED STATES COURT OF APPEALS
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Defendant and Third Party
Plaintiff-Appellant,

v.

WAYNE CRAWFORD,

Plaintiff-Appellee,

BRADY-HAMILTON STEVEDORE
COMPANY, a corporation,

Third Party Defendant-
Appellee

APPELLANT'S BRIEF

Appeal from the Final Judgment of the United
States District Court for the District of Oregon.
THE HONORABLE ROBERT C. BELLONI, Judge

STATEMENT OF JURISDICTION

This action was filed on October 4, 1966, in
the United States District Court for the District of
Oregon (R.¹ 1). As set forth in the complaint (R. 1),
and answer (R. 3) and the pretrial order (R. 12), diversity
of citizenship existed between the parties and the amount
in controversy exceeded \$10,000, exclusive of interest and
costs. Accordingly, the jurisdiction of the District

¹The Clerk's record is referred to herein as "R." The
reporter's transcript is referred to as "Tr."

Court was properly invoked under the provisions of 28 USCA, Section 1332.

The action was tried before the Honorable Robert C. Belloni, sitting with a jury, on June 13 and 14, 1967. The jury returned its verdict in favor of plaintiff-appellee and against defendant-appellant, and against defendant-appellant and in favor of third party defendant-appellee, whereupon the District Court entered its judgment based upon the verdicts on June 14, 1967 (R. 85).

Defendant-appellant filed a motion for judgment n.o.v. and for a new trial on June 26, 1967 (R. 86), which was denied by order of the District Court dated July 10, 1967 (R. 93). Defendant-appellant filed notice of appeal on August 8, 1967 (R. 95), within the time allowed by Rule 73(a), Federal Rules of Civil Procedure.

By reason of the foregoing, this court has jurisdiction to review the judgment of the District Court under the provisions of 28 USCA, Section 1291.

STATEMENT OF THE CASE

A. Nature of the Action

This is an action brought by Wayne Crawford ("plaintiff,") a longshoreman, against Judith Ann Liberian Transport Corporation, Ltd. ("Shipowner,") owner of the vessel JUDITH ANN, for personal injuries allegedly sustained by plaintiff while engaged in the discharge of cargo

from the vessel at Portland, Oregon, on May 3, 1966. Plaintiff's claim against Shipowner is based upon the alleged unseaworthiness of the vessel in certain specified particulars (R. 13).

Shipowner denied that it was liable to plaintiff, and impleaded Brady-Hamilton Stevedore Company ("Stevedore,"), asserting a right to indemnity for any liability that might accrue against Shipowner by reason of plaintiff's claim. Shipowner's indemnity claim is predicated upon the proposition that if it is liable to plaintiff on account of its vessel's being unseaworthy, as charged by plaintiff, such unseaworthy condition was either created by or fully known to Stevedore, which nevertheless failed to stop work or remedy such condition and, in fact, brought the same into play so as to cause plaintiff's injury (R. 15).

B. Summary of Facts

On May 3, 1966, plaintiff was employed as a longshoreman aboard the vessel JUDITH ANN, which was berthed at Portland, Oregon (R. 12). Plaintiff was in the employ of Stevedore, a master stevedore company, and was engaged with his fellow longshoremen in discharging cargo under the express direction and control of Stevedore (R. 12). Stevedore's activities in connection with the discharge of the vessel were being

performed pursuant to a written contract with the charterer of the vessel (R. 12, 13; Ex. 31).

Plaintiff was working in a longshoreman gang which was discharging a cargo of steel reinforcing bars (rebars) from the lower hold at No. 4 hatch (Tr. 51, 58). The steel bars were in bundles and were approximately twenty feet long (Tr. 59). In order to remove the bundles of steel bars, the longshoremen were using a cradle-type "pickup" sling (Tr. 79). This sling was inserted under one end of the load, which was then raised by means of a dockside crane (Tr. 79). At the time of the plaintiff's accident, one end of a load of steel bars had been so hoisted--approximately three feet high--and the load stopped (Tr. 62, 79), either for the purpose of then putting a regular loading sling around the load, as testified to by some of the witnesses (Tr. 60, 79, 123), or of placing a 4 x 4 timber under the load, which one of the witnesses testified the plaintiff was attempting to do when the accident occurred (Tr. 213, 214).

At this point, the load, or a portion of it, slipped out of the pickup sling and one or more of the bundles lit on a 4 x 4 piece of dunnage which struck the plaintiff on the head, causing the injuries complained of (Tr. 63, 66, 80, 117, 213, 214).

C. Nature of Judgment

The jury returned its verdict in favor of plaintiff and against Shipowner in the sum of \$194,058.55 and the District Court entered judgment accordingly. The District Court likewise entered judgment in favor of Stevedore on Shipowner's indemnity claim, pursuant to the jury's verdict.

D. Questions Presented on Appeal

Shipowner, by this appeal, raises questions relating both to the trial of the plaintiff's injury claim against it and to the trial of its indemnity claim against Stevedore.

With respect to the plaintiff's claim, the questions presented concern the propriety of the District Court's action in giving certain of the plaintiff's requested instructions, and in refusing to give certain instructions requested by Shipowner.

With respect to Shipowner's indemnity claim, this appeal presents the question of whether the trial court erred in failing to direct a verdict in favor of Shipowner on this issue. Additionally, error is asserted in connection with the trial court's failure to give certain instructions requested by Shipowner and in failing to submit to the jury a special verdict form to delineate the factual issues to be determined.

SPECIFICATIONS OF ERROR

A. Plaintiff's claim against Shipowner:

1. The District Court erred in giving plaintiff's Requested Instruction No. 7, as follows:

"I instruct you that the shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably fit for the purpose for which it was intended. This liability extends to longshoremen who work aboard the vessel and employ contracting stevedore companies. Even if the owner engaged others, such as the stevedore companies who supply equipment necessary for stevedoring operations, he must still answer to a longshoreman if the gear proves to be unseaworthy.

"I further instruct you that if the injuries to the plaintiff were caused by some malfunctioning in the rigging used for unloading the vessel or by some defect in the equipment used, or if there was improper use of the equipment by other longshoremen, the shipowner would be liable to the plaintiff for unseaworthiness. The obligation of providing seaworthy equipment is absolute and extends to all loading or unloading equipment used on the vessel." (Tr. 278-279).

Counsel for Shipowner duly excepted to the giving of this instruction, as follows:

"I will also object to the giving of Plaintiff's Requested Instruction No. 7, and with particular reference to the second paragraph in which you instructed, 'If the injuries to plaintiff were caused by some malfunction in the rigging used for loading the vessel or by some defect in the equipment used.' I think 'loading the vessel' is a typographical error, and I am not sure if I followed you close enough to see if you interpolated unloading or not. But in any event, there is no evidence to the effect that there is any malfunctioning in the rigging." (Tr. 298).

2. The District Court erred in giving plaintiff's

"You are instructed that the duties imposed upon the shipowners and the law in respect to the safety of employees are nondelegable; that is to say, the employer cannot delegate the performance of those duties to any other agent or employee. The defendant in this case cannot absolve itself of the performance of those duties, nor could it delegate the performance of them to employees, to the stevedore company, nor to anyone else, but they adhere to the defendant shipowner without the possibility of suspension or interruption." (Tr. 279).

Counsel for Shipowner duly excepted to the giving of this instruction, as follows:

"I also take exception to Plaintiff's Requested Instruction No. 8 in which it is stated that, 'The duties imposed upon the shipowner and the law with respect to the safety of employees is nondelegable.' This is true, but then you went on to say, 'The employer cannot delegate the performance of those duties to any agent or employee.' I take exception to this. The employer can delegate the performance. He cannot rid himself of the obligation, but the ship certainly can go into port and hire a stevedore to accomplish the performance of the duties." (Tr. 298).

3. and 4. The District Court erred in failing to give Shipowner's Requested Instructions No. 24 and No. 25, respectively, as follows:

No. 24. "The plaintiff contends in this case that the ship was unseaworthy because of improper stowage of cargo. I instruct you that the method or manner of cargo stowage renders a vessel unseaworthy only when it results in an unreasonable hazard to the safety of the men required to work in and around the cargo. The mere fact that a particular manner of stowage requires more effort in order to discharge the cargo, or requires the use of other and different equipment than may be customarily used for cargo discharge, does not make the

vessel unseaworthy so long as methods and equipment are available which can be used to discharge the cargo without undue or unreasonable risk to the safety of those performing the work." (R. 72).

No. 25. "I instruct you that the fact that cargo is stowed in such a manner as to require the use of a pick-up sling in order to discharge it does not render the vessel unseaworthy." (R. 73).

Counsel for Shipowner duly excepted to the court's failure to give these requested instructions, as follows:

"[I also except, your Honor, to the] * * * failure to give Nos. 24, 25, and 26. Now, the only reason I requested 26 was to point out to the jury that the law regarding the extension of the obligation of seaworthiness does not extend to the stevedore company, although it does to the longshoremen." (Tr. 299-300).

B. Shipowner's indemnity claim against Stevedore:

1. The District Court erred in failing to grant Shipowner's motion for a directed verdict on its indemnity claim against Stevedore and in denying its motion for judgment n.o.v. made following the entry of judgment.

At the close of the evidence, counsel for Shipowner orally moved for a directed verdict against Stevedore, as follows:

"Mr. Carlsen: * * * I hope maybe we can alleviate that right now, your Honor, with my motion for a directed verdict against the stevedore.

"I think as a matter of law that there is no question under all the facts presented here that a directed verdict must be presented, and maybe we could eliminate the necessity of submitting that aspect of it to the jury.

"The Court: Do you have anything to say other than what you said in your defendant's memorandum

on the indemnity claim? This is your argument, isn't it? [The memorandum referred to by the court appears in the record, R. 21-27.]

"Mr. Carlsen: Yes, your Honor, plus--the law in the memorandum, plus it is clear that there was knowledge of the condition on the part of the stevedore prior to the time. There is no question about the fact that if unseaworthiness is found, that unseaworthy condition was brought into play by the stevedore. There is no question also that if it is found that the sling used was improper, then that sling was furnished by the stevedore.
* * *. (Tr. 256-257).

"The Court: The defendant's memorandum on this indemnity claim goes on for six pages and states the law, and I think it states it accurately, and then it makes this huge leap as a conclusion: 'Based upon the principles set forth above, defendant respectfully urges that it is entitled to indemnity against third party defendant as a matter of law.' But it goes on for six pages and doesn't require that conclusion. I can't find a single case which you have cited--and I read them--which says anything about the third party defendant being liable without fault.

"Mr. Carlsen: Well, your Honor, the fault is continuing to work when the stevedore was in possession of knowledge that continuing to work might create a dangerous condition. (Tr. 259-260).

"The Court: Well, that motion is denied." (Tr. 261).

Additionally, Shipowner requested an instruction which, by its terms, directed a verdict in favor of Shipowner against Stevedore on the indemnity issue. This was Shipowner's Requested Instruction No. 17, as follows:

"I instruct you that, under the evidence presented in this case, the defendant vessel owner is entitled to indemnity against the third party defendant stevedore company for any liability you may find the defendant has to the plaintiff in this case. Accordingly, if you return your

verdict in favor of the plaintiff, you shall likewise return your verdict, in an identical amount, in favor of the defendant and against the third party defendant." (R. 65).

Counsel for Shipowner duly excepted to the court's failure to give this instruction:

"I also except, your Honor, to the failure of the Court to give our Requested Instruction No. 17, which requires a directed verdict against the third party. * * *" (Tr. 299).

Following the entry of judgment upon the verdict, Shipowner filed its motion, as against Stevedore, for judgment n.o.v. in accordance with its motion for a directed verdict (R. 87-89). This motion was denied by order of the District Court dated July 10, 1967 (R. 93). 2., 3., 4. and 5. The District Court erred in failing to give Shipowner's Requested Instructions Nos. 18, 19, 21 and 22, respectively, as follows:

No. 18. "I instruct you that it is undisputed in this case that the pick-up sling being used by the stevedore company at the time of the plaintiff's accident was furnished and provided by the stevedore company. I further instruct you that, for purposes of this case, the stevedore company is charged with knowledge of the condition of this pick-up sling. If you find, under the instructions I have given you, that the plaintiff is entitled to recover against the defendant vessel owner because this pick-up sling was inadequate or unsafe, in not being equipped with a hook or other securing device to keep it from slipping, then I instruct you that the vessel owner is entitled to indemnity from the stevedore company as a matter of law and you will return your verdict accordingly." (R. 66).

No. 19. "If you find, under the instructions I have

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given you, that the plaintiff is entitled to recover from the defendant vessel owner because the stowage of the cargo in question was such as to render the vessel unseaworthy, and if you further find that the employees of the stevedore company were aware of the method and manner in which the subject cargo was stowed but the stevedore company failed to stop work or to take steps to remedy such condition before proceeding with the discharge of cargo, then I instruct you that the vessel owner is entitled to indemnity from the stevedore company as a matter of law and you will return your verdict accordingly." (R. 67).

No. 21. "I instruct you that if the conditions surrounding the discharge of cargo from the subject vessel were such as to render the operations unsafe for the longshoremen performing such discharging services, then it was the duty of the stevedore company to stop such discharging operations when it reasonably appeared that to proceed would be unsafe. If you have based an award for the plaintiff upon a finding either that the improper stowage of cargo created an unsafe condition or that the use of a pick-up sling not equipped with a hook or other securing device created an unsafe condition and if you further find that the stevedore company knew or should have known of such unsafe condition or conditions and did not suspend or stop the discharging operations, then the failure of the stevedore company in such regard would constitute a breach of its duty and you should return your verdict in favor of the vessel owner on its third party indemnity claim." (R. 69).

No. 22. "I instruct you that although a vessel owner may be initially responsible for the creation or existence of an unseaworthy condition which renders the vessel unsafe for longshoremen who are required to work aboard, the stevedore company which has undertaken to load or discharge the vessel still owes the duty to the vessel owner, when it knows or has reason to know of the existence of such condition, to suspend or stop work until the same can proceed in safety. So in this case, if you find that the stevedore company knew or reasonably should

have known of any unseaworthy condition which rendered it unsafe for its longshoremen employees to work aboard the vessel, its failure to suspend or stop operations until the work could safely resume would be a breach of its obligation to the vessel owner which would entitle the vessel owner to indemnity for any loss or liability which would not have occurred had the work been stopped. This is so even though the vessel owner may have been responsible initially for the unseaworthy condition which created the hazard. In other words, if a stevedore company brings an existing unseaworthy condition into play either by utilizing an unsafe method to discharge cargo or by continuing with work when it knows or should know that it is unsafe to do so, this will constitute a breach of its obligation owed to the vessel owner." (R. 70).

Counsel for Shipowner duly excepted to the failure of the court to give the foregoing Requested Instructions, as follows:

"I also except, your Honor, to the 7* * * failure to give our Requested Instruction No. 18, regarding that if they find that the injury was caused by the misuse or use of a wrong pickup sling, then we are entitled to indemnity.

"Failure to give our Requested Instruction No. 19, in which we ask the jury to be advised that if the stevedore company was aware of the method and failed to stop work, then we would be entitled to indemnity.

* * *

"No. 21, in which we ask that the jury be advised that under certain circumstances, they would have the obligation to stop work.

"Now, 21 and 22, your Honor, I'm sure are somewhat repetitious. My exception goes to the failure of the Court to instruct the jury on the obligation of the stevedore company to stop work." (Tr. 299-300).

6. The District Court erred in failing to submit to the jury the special verdict form requested by Shipowner.

Shipowner requested that a special verdict form (R. 83-84) be submitted to the jury. The court, although commenting that the special verdict form was well prepared, declined to use it.

"The Court: Well, I think that it is well-done, Mr. Carlsen. I would prefer a general verdict also. There are a lot less problems that arise after the jury goes out to deliberate, from my experience. We would seem to get along better with the general verdicts, which we are more used to." (Tr. 266).

Counsel for Shipowner duly excepted to the court's action in this regard:

"Mr. Carlsen: First of all, your Honor, I except to the Court's failure to submit the special verdict form." (Tr. 297).

SUMMARY OF ARGUMENT

A. Plaintiff's claim against Shipowner

The trial court gave two instructions which were improper. One of these advised the jury that it might find liability against Shipowner because of "malfunctioning in the rigging used"--a form of unseaworthiness entirely unsupported by the evidence and, in fact, not even charged in the pleadings. The other erroneously told the jury that Shipowner could not delegate to Stevedore the performance of any of the

duties owed by Shipowner to shipboard workers (as distinguished from the responsibility therefor). In the context of the instant case, both these instructions were very probably misleading to the jury, to Shipowner's prejudice.

Additionally, the court below refused to give two instructions requested by Shipowner which related to plaintiff's charge that the vessel was unseaworthy because of improper stowage. These instructions set forth correct statements of the law, there existed a proper evidentiary basis for them in the record and their substance was not otherwise covered by any of the instructions given by the court. As a result, Shipowner was deprived of the right to have its theory of the case, in certain critical respects, presented to the jury by appropriate instructions.

B. Shipowner's indemnity claim against Stevedore

Shipowner was entitled to a directed verdict against Stevedore upon its indemnity claim. Any liability of Shipowner to plaintiff was necessarily predicated, as the issues were ultimately framed, upon unseaworthiness in one of two respects--either (1) improper stowage of cargo, which rendered the discharge operations unreasonably hazardous or (2) the use of a pick-up sling which was not equipped with a proper hook or other securing device to keep it from slipping . Under the evidence presented,

Shipowner is entitled to indemnity from Stevedore, as a matter of law, in either event.

It is undisputed that the pickup sling in question, together with the other gear used by the long-shoremen, was furnished by Stevedore and that the entire discharging operation was conducted under the direction and control of Stevedore. Accordingly, if Shipowner's liability to plaintiff is based upon the use of the Stevedore furnished and controlled pickup sling, there can be no question as to Shipowner's right to indemnity.

The same result obtains if Shipowner's liability is based upon unseaworthiness resulting because the method of cargo stowage created unreasonable hazards or danger to those engaged in the work of unloading. The evidence again affirmatively shows that any such unseaworthiness was fully known to Stevedore at the very outset, notwithstanding which it took no steps to alleviate or eliminate the hazards or dangers presented, did not stop or discontinue the work and, by requiring its employees to continue with the unloading activities in the face of such hazards, brought such unseaworthy condition into play so as to cause plaintiff's accident and resulting injuries. Under these circumstances, the rule is clear that a vessel owner is entitled to indemnity from the master stevedore to whom the work is entrusted.

In any event, the trial court committed prejudicial error in refusing to give instructions requested by Shipowner which would have fairly presented its theory of the indemnity case to the jury. The court, in fact, gave none of the instructions requested by Shipowner which related the applicable law governing the rights between vessel owner and Stevedore to the particular facts of this case. The only instruction the jury was given on this phase of the case was the general charge that Stevedore had the duty to perform its work in a skillful, safe, and workmanlike manner and that if its failure to do so was the cause of plaintiff's accident then it must indemnify Shipowner. Due to the court's failure to give Shipowner's requested instructions, the jury remained entirely unadvised that Stevedore's warranty of workmanlike performance would be breached, and Shipowner entitled to indemnity, if the unseaworthiness upon which plaintiff's recovery is based consisted of the use by Stevedore of improper or unsafe appliances furnished by it, or if the Stevedore, with knowledge of an existing unseaworthy condition, nevertheless proceeded with the work and continued to subject its employees to the dangers presented, thereby "bringing into play" such unseaworthy condition. These points, of course, were vital to Shipowner's position and the failure to instruct the jury regarding them was necessarily prejudicial to Shipowner.

These errors were compounded by the court's refusal to submit the factual issues to the jury by means of a special verdict form--the practice strongly advised by this court and others in this type of case. The result is that there is no way now to determine what may have been the basis of the jury's ultimate findings.

ARGUMENT

A. Plaintiff's Claim against Shipowner

1. The trial court erred in giving plaintiff's Requested Instruction No. 7.

This instruction (set forth verbatim at page 6, supra) told the jury that "if the injuries to the plaintiff were caused by some malfunctioning in the rigging used for unloading the vessel" Shipowner would be liable to the plaintiff for unseaworthiness.

Malfunctioning in the rigging was not one of the specifications of unseaworthiness charged by plaintiff, nor was there any evidence that plaintiff's accident was caused by any such malfunctioning in the rigging. This instruction, in effect, advised the jury that it could make a finding of unseaworthiness on a specification neither alleged nor proved. It is, of course, error to permit the jury to make a determination of liability upon a specification not charged.

Carpenter v. Baltimore & O.R. Co. (CCA 6, 1940)
109 F2d 375

"The appellee did not plead contributory negligence or assumed risk as a defense and no inference of either upon the part of appellant is found in his pleadings * * * and no issue is made upon these questions.

"Applying the well-recognized rule that in determining the scope of instructions, the court must keep in mind the issues as made by the pleadings in the cause and that no instructions be given which tender an issue not supported by the pleadings, the court committed an error in submitting to the jury the issue of contributory negligence and assumed risk and in charging the jury that the fellow servant rule applied."
(p 379).

Moreover, there being no support in the evidence for that portion of the instruction set forth above, the same is purely abstract and, at the very least, permitted the jury to indulge in speculation. This likewise constitutes error.

Dormaier v. Jessee (Or, 1962) 369 P2d, 131,
230 Or 194

"The giving of instructions not supported by evidence permits the jury to speculate and is error. Layne v. Portland Traction Co., 212 Or. 658, 675, 319 P.2d 884, 321 P.2d 312; Prauss v. Adamski, 195 Or. 1, 15, 244 P.2d 598." (369 P2d, 133).

In a case such as this, involving relationships and terminology peculiar to the maritime and generally unfamiliar to the average layman, a substantial probability exists that an instruction with this vice may mislead the jury. In any event, it cannot be concluded with any

assurance that it did not.

2. The trial court erred in giving plaintiff's Requested Instruction No. 8.

This instruction (set forth verbatim at page 7, supra), speaking of the duties imposed upon shipowners with respect to the safety of employees, properly stated that such duties are nondelegable. However, it then went on to explain: "That is to say, the employer cannot delegate the performance of these duties to any other agent or employee * * * nor could it delegate the performance of them to * * * the stevedore company * * *."

This is an erroneous statement of the law. The court, in defining "nondelegable," mistakenly instructed that Shipowner could not delegate the performance of the duties in question to Stevedore or anyone else. Although it is true that the vessel owner cannot avoid the responsibility imposed upon it by such duties, there is no prohibition to the delegation of their performance. As there is no question but that Shipowner here did delegate the performance of the entire discharging operation to Stevedore, including those measures and precautions necessary for the safety of its employees, the instruction had the effect of advising the jury that Shipowner's conduct in this respect was prohibited by law. The culpability of Shipowner was thereby suggested at the outset and, when the plaintiff's

accident thereafter occurred, the natural conclusion to be drawn by the jury is that Shipowner must necessarily be liable therefor.

3. The trial court erred in failing to give Shipowner's Requested Instruction No. 24.

This instruction (set forth verbatim at pages 7-8, supra) sets out a standard for determining whether a vessel is unseaworthy by reason of the method or manner of cargo stowage--i.e., "when it results in an unreasonable hazard to the safety of the men required to work in and around the cargo." This is the standard contained in the instructions which were approved by this court in Blassingill v. Waterman Steamship Corp. (CA 9, 1964) 336 F2d 367

and, it is submitted, is a correct statement of the law.

The latter part of the instruction, which states:

"The mere fact that a particular manner of stowage requires more effort in order to discharge the cargo, or requires the use of other and different equipment than may be customarily used for cargo discharge, does not make the vessel unseaworthy so long as methods and equipment are available which can be used to discharge the cargo without undue or unreasonable risk to the safety of those performing the work."

relates the general standard to the particular facts of this case which are pertinent to Shipowner's theory of the case.

As this court stated in Blassingill, supra,

"* * * a party is entitled to have his theory of the case presented to the jury by proper instructions, if there be any evidence to support it." (336 F2d 368)

The propriety of the trial court's instructions, of course, must be viewed in the light of the respective contentions of the parties and the evidence presented. Here, plaintiff claimed that the vessel was unseaworthy because (1) the cargo in question was not blocked, or "stickered," with dunnage of sufficient width to permit the regular cargo slings to be placed under the loads and that a "pickup" sling was therefore required to be used as a preliminary procedure and (2) the pickup sling being used was a "cradle" type, rather than a "choker" type which would have prevented the cargo from slipping.

The above requested instruction embodied one of the principal elements of Shipowner's theory of the case--i.e., that the cargo stow in question was in keeping with the usual and customary practice and that it did not pose any unreasonable risk of harm to the longshoremen engaged in the discharge if proper methods and equipment were utilized by the master stevedore.

There is ample evidence in the record to support this position. Witness Anderson, the supercargo who handled the JUDITH ANN, testified (Tr. 226) that the cargo was stowed properly and in the usual manner for ships

coming into Portland with the same type of cargo. Witness Finley, Stevedore's foreman, although indicating later in his testimony that it would have been safer had the cargo been blocked so as to allow the use of the main cargo slings in the first instance, testified that many ships carrying this type of cargo are stowed in the same fashion and that the only reservation he had as to the propriety of the stow was that it wasn't as easy to discharge (Tr. 241).

From the plaintiff's own witnesses it appears that whatever danger existed during the course of the discharge of this cargo was the direct result, not of the manner of stowage, but of the method and equipment used in the discharge operation. Witness Woods, one of plaintiff's fellow longshoremen, testified that a choker type sling is usually used under the circumstances here present, that such choker sling could have been used, that its use is preferred and that if a choker type pickup sling had been used on the load in question the result would have been different.

Witness Cowan, another of plaintiff's fellow longshoremen, similarly testified that Stevedore did not provide their gang with a choker type pickup sling (Tr. 165), that the choker type sling could have been used in place of the cradle type which was used (Tr. 167), that the choker type would have "choked" the steel because of the

increased friction (Tr. 167-168) and that if they had been furnished the choker type sling they would have used it (Tr. 169). As he stated, referring to the cradle type pickup sling:

"Well, we really don't like to pick the steel up with a pickup sling of that type." (Emphasis supplied) (Tr. 156).

Cowan also indicated that the proper method of utilizing the cradle type pickup sling--and the method which was being used for this cargo--was to pick the load up only a very few inches with the pickup sling, and then to block it with a 4 x 4 so that the main cargo sling could then be put around the load:

"We avoid going very high with this load, with this type of sling. The pickup--oh, if we can get by, we pick up only a few inches and block it.

* * *

"We only pick up a very few inches and block this load due to the danger of this slipping." (Tr. 156).

It is obvious, even to a layman, that if this method had been used, instead of raising the load three or four feet in the air and attempting to affix the main cargo sling (or, as Witness Rensklev indicated was being done, to place a block) while the load of steel hung thus suspended, the hazard which led to plaintiff's injury would have been entirely eliminated.

Additionally, Cowan testified that the unloading method being employed in this instance--i.e., using the cradle type pickup sling in the manner described--was not the only practical way to discharge this cargo and that the use of the ship's winch, rather than a dockside crane, would have made it "much easier to control picking the loads up" (Tr. 162).

Witness Anderson, supercargo, testified that he handles steel ships as often as two to three times a month. He stated that he has never seen cargo of steel reinforcing bars stowed with 4 x 4 blocks (Tr. 234). He testified that the customary method for placing slings around the bundles of steel bars is by prying up the ends and putting in blocks (Tr. 234).

It is again obvious that if such method had been used in this instance the hazard which led to plaintiff's accident would never have arisen.

Thus, there is evidence in the record that alternative methods were available to unload the cargo in question and that such methods, had they been used, would have minimized or eliminated the hazard which led to plaintiff's injury. Accordingly, Shipowner was entitled to have its theory of the case presented by means of its requested instruction.

It should be further noted that the court's

failure to give this instruction was particularly harmful to Shipowner's position, as the court nowhere else in its instructions gave the jury a meaningful standard by which to determine whether or not the stowage in this instance was seaworthy. The only instruction which in any way attempted to set forth such a standard for the jury's guidance advised simply that Shipowner had a duty to maintain the stowage in a seaworthy condition, which was defined to be "a condition reasonably suitable and fit for the purpose or use for which provided or intended" (Tr. 276). This may be adequate when the matter in question is the seaworthiness of the ship, or its gear or appliances, but it obviously does little to enlighten a layman concerning a shipowner's duties, as regards cargo stowage, to longshoremen

The overall result is that the court's instructions have failed altogether to advise the jury that a finding of unseaworthy stowage must be based upon a finding that the stow in question caused an unreasonable risk of harm to plaintiff. This is a void which the requested instruction, following Blassingill, would have filled.

4. The trial court erred in failing to give Shipowner's Requested Instruction No. 25.

This instruction (set out verbatim at page 8, supra) would have told the jury that a vessel is not

rendered unseaworthy simply because its cargo is stowed in such manner as to require the use of a pickup sling in order to discharge it.

Shipowner requested this instruction in line with its theory that the cargo stowage here in question was not the source of the danger which led to plaintiff's accident and that, if any undue hazards were presented during the unloading operations, they were created by the discharge method and appliances chosen by Stevedore.

There was no evidence presented which would support the proposition that the employment of any type of pickup sling, under any and all circumstances and no matter how carefully used or what precautions taken, creates an unreasonable risk or hazard.

On the contrary, reference has hereinabove been made to the evidence which tends to show that the cradle type pickup sling here being employed could have been used (by lifting the load only a few inches and placing blocks underneath it) in a manner which would have, without question, avoided plaintiff's accident. Attention has also been directed to the testimony concerning the choker type pickup sling which likewise could have been used without the danger which accompanied Stevedore's method of using the cradle type sling. Moreover, the testimony of practically all the witnesses establishes that pickup slings of the types mentioned are standard and well known appliances used

with considerable frequency on the waterfront. It is doubted that anyone would seriously contend that any time any such slings are used in connection with the discharge of cargo, and regardless of the circumstances, the vessel then and there becomes unseaworthy.

It is submitted that the instruction requested is a correct statement of the law and that, under the evidence presented, Shipowner was entitled to have the jury so instructed as part of the presentation of its theory of the case.

B. Shipowner's Indemnity Claim against Stevedore

1. The trial court erred in denying Shipowner's motions for directed verdict and for judgment n.o.v. against Stevedore.

At the close of all the evidence, Shipowner moved for a directed verdict in its favor upon its indemnity claim against Stevedore on the ground that any liability on its part to plaintiff was, as a matter of law, caused by the breach of Stevedore's warranty of workmanlike service (Tr. 256-257, 259-260). Additionally, an instruction (Shipowner's Requested Instruction No. 17) was requested for the same purpose (R. 65). After the entry of judgment, Shipowner duly moved for judgment n.o.v., as against Stevedore, in accordance with its motion for a directed verdict. Under the evidence

presented in this case, and the governing rules of law, it is clear that Shipowner's motions should have been granted.

As has been shown, Shipowner's liability to plaintiff is necessarily predicated upon unseaworthiness in one of two respects--either (1) improper stowage of cargo, which rendered the discharge operations unreasonably hazardous, or (2) the use of an unsafe pickup sling. Because of the court's refusal to submit the factual issues to the jury by means of a special verdict form, it cannot be ascertained whether the jury's finding of unseaworthiness is based upon one or the other of these charges, or both. However, the evidence requires an award of indemnity to Shipowner in either case.

The following facts are undisputed: The discharging operation was being performed under the express direction and control of Stevedore (Agreed Facts, pretrial order, R. 12); Stevedore, by its written contract, was required to furnish all necessary labor and supervision and all ordinary gear, including usual appliances used for stevedoring (Ex. 31); the pickup sling being employed by Stevedore on the load of steel reinforcing bars at the time of plaintiff's accident was, in fact, furnished by Stevedore (Tr. 84); Stevedore, not only through the longshoremen working in the hold, but through its foreman, was fully aware of the condition of the cargo, including

the method and manner of stowage, prior to plaintiff's accident (Tr. 240) and of the method being used to discharge the cargo (Tr. 238-239); and the longshoremen working in the hold had made known to their boss their complaints concerning the manner of stowage and the method of discharge being utilized (Tr. 71, 88, 159).

If Shipowner's liability to plaintiff is based upon the use of the cradle type pickup sling being employed at the time of plaintiff's accident, it is axiomatic that indemnity must be allowed. The authorities hold with virtual unanimity that where the unseaworthiness which results in liability to a vessel owner stems from the use of unsafe appliances furnished by the stevedore, or employment by the stevedore of an unsafe method of operation, the stevedore's warranty of workmanlike service is breached and the vessel owner is entitled to indemnity.

Italia Societa v. Oregon Stevedoring Company, Inc.
(1964) 376 US 315, 84 S Ct 748, 11 Led2d 732

In that case, the vessel owner was found to be liable to a longshoreman who was injured because of a defective rope. In the vessel owner's action against the stevedore for indemnity, the District Court ruled in favor of the stevedore because there was no showing of negligence on the stevedore's part. This court affirmed and the issue was then taken to the United States Supreme

Court on petition for certiorari. The Supreme Court held that the vessel owner was entitled to indemnity even though there was no showing of negligence or fault on the stevedore's part.

"Oregon, a specialist in stevedoring, was hired to load and unload the petitioner's vessels and to supply the ordinary equipment necessary for these operations. The defective rope which created the condition of unseaworthiness on the vessel and rendered the shipowner liable to the stevedore's employee was supplied by Oregon, and the stevedoring operations in the course of which the longshoreman was injured were in the hands of the employees of Oregon. Not only did the agreement between the shipowner place control of the operations on the stevedore company, but Oregon was also charged under the contract with the supervision of these operations. Although none of these factors affect the shipowner's primary liability to the injured employee of Oregon, since its duty to supply a seaworthy vessel is strict and nondelegable, and extends to those who perform the unloading and loading portion of the ship's work, *Seas Shipping Co. v. Sieracki*, 328 US 85, 90 L ed 1009, 66 S Ct 872, cf. *Pope & Talbot v. Hawn*, 346 US 406, 98 L ed 143, 74 S Ct 202, they demonstrate that Oregon was in a far better position than the shipowner to avoid the accident. The shipowner defers to the qualification of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedore company." (Emphasis supplied) (376 US 322-323)

If a stevedore must indemnify a ship owner because of the use of an unsafe appliance when there is no negligence or fault on the stevedore's part, it is an a fortiori proposition that indemnity must be allowed where there is nothing latent about the danger and any impropriety in the use of the appliance must have been

known to the stevedore.

This court, in the quite recent case of Rederi A/B Nordstjernen v. Crescent Wharf & Warehouse Co. (CA 9, 1967) 372 F2d 674 held that indemnity in favor of a vessel owner should have been awarded as a matter of law where the stevedore company utilized an unsafe method of discharging cargo and, with knowledge of the hazards presented, failed to discontinue the work.

"The third-party complaint for indemnity was an action for breach of the stevedore's warranty of workmanlike service. Counsel for appellee stevedoring company admitted that appellee had breached its contract in two respects, failing to stop work and using an unsafe method to discharge the cargo. (R.T. pp. 281-82). Certainly had it ceased work the injury would not have occurred. Reasonable men could not differ that it was the admitted failings of appellee which brought into play the unseaworthy condition of the vessel to cause the injury. Appellant was entitled, as a matter of law, to judgment of indemnity, and the district court erred in not granting that judgment." (Emphasis supplied) (page 677).

It is true that there the stevedore company admitted that it had breached its warranty of workmanlike service. However, if the verdict in favor of the plaintiff in the instant case is based upon unseaworthiness resulting from the use of the pickup sling, the verdict establishes conclusively the same breach that was admitted in the above case--"using an unsafe method to discharge the cargo."

Mosley v. Cia. Mar. Adra S.A. (CA 2, 1966)
362 F2d 118

In this case, the plaintiff longshoreman was awarded damages against the shipowner because of injuries received while loading the latter's vessel. The District Court awarded indemnity against the stevedore by granting the shipowner's motion for judgment n.o.v. after a jury verdict in favor of the stevedore on the indemnity issue. The Court of Appeals affirmed, stating:

"On the merits of the n.o.v. motion, the trial judge ruled that 'any seaworthy condition obtaining in the 'tween deck area was created by the stevedore * * *.' A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See *Mortensen v. A/S Glittre*, 348 F.2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service. See, e.g., *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 318-324, 84 S.Ct. 748, 11 L.Ed.2d 732 (1964); *Crumady v. Joachim Hendrik Fisser*, 358 U.S. 423, 428-429, 79 S.Ct. 445, 3 L.Ed.2d 413 (1950); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 133-134, 76 S.Ct. 232, 100 L.Ed. 133 (1956)." (Emphasis supplied) (page 122)

A similar holding is found in

DeVan v. Pennsylvania Railroad Company (DC, Pa, 1958)
167 F Supp 336

where the shipowner's liability to an injured longshoreman resulted from the use of an unsuitable cargo hook in connection with the loading of pipe. The shipowner was

awarded indemnity against the stevedore because, as the court found, the hook in question had been furnished by the stevedore and the method and manner of loading the pipe was under the supervision and direction of the stevedore.

"Since the cargo hook was supplied by Independent Pier Company pursuant to its obligation under the second paragraph of Section 3 of the agreement of April 17, 1954, and Independent's breach of its implied warranty of performing the loading in a workmanlike and safe manner is the substantial cause of the liability of Grace Line, Inc., as stated in Conclusion of Law 3 above, Grace Line, Inc., is entitled to indemnity against Independent Pier Company for the entire amount of such liability. See *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 1958, 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed. 2d 491." (page 344).

The same result is reached if shipowner's liability to plaintiff is predicated upon the unseaworthiness charge of improper stowage. As shown above, there was nothing about the manner of stowage or the condition of the cargo, and any hazards or danger thereby presented, which was not fully known to stevedore. Nevertheless, stevedore took no steps to alleviate or eliminate such hazards, nor did it stop or discontinue the work. Rather, it required its employees to continue with the unloading, using the same procedures and equipment and exposed to the same hazards. It thereby brought any unseaworthy condition which existed into play.

The law is again clear that, under such circumstances, shipowner is entitled to indemnity as a matter of law.

Since the rule was first announced in

Crumady v. "Joachim Hendrik
Fisser" 358 US 423, 79 S Ct
445, 3 Led2d 413

the courts have consistently held that where a stevedore, with knowledge of an existing unseaworthy condition aboard a vessel, continues with its work and takes no steps to reduce or eliminate the danger presented or to have the ship do so, it must indemnify the shipowner for liability resulting when one of the stevedore's employees is thereafter injured during the course of such work.

Rederi A/B Nordstjernen v. Crescent Wharf &
Warehouse Co. (CA 9, 1967) 372 F2d 674

In that case, as in the instant case, the plaintiff longshoreman sought damages for injuries sustained while unloading the defendant's vessel and the defendant impleaded the stevedore company on a third party complaint seeking indemnification. There, as here, the plaintiff claimed that the cargo had been improperly stowed and that an unsafe method of discharging was utilized. In a jury trial, the plaintiff obtained a verdict against the shipowner, but the shipowner was denied indemnity against the stevedore company. On appeal, this court reversed, holding that the shipowner

was entitled to indemnity as a matter of law because the stevedore company "brought into play the unseaworthy condition of the vessel to cause the injury."

It may be argued that the case is distinguishable because there the stevedore admitted that its failure to stop work constituted a breach of its warranty of workmanlike service. However, in the instant case it is admitted that stevedore failed to stop work and, if the condition of the cargo was such as to create an unreasonable hazard to the longshoremen (as it must have been in order for the jury to make a finding of unseaworthiness on the stowage charge), the stevedore had a clear duty to stop work and its failure to do so constituted a breach of its warranty of workmanlike service. Accordingly, the following language of this court is eminently apposite:

"The third-party complaint for indemnity was an action for breach of the stevedore's warranty of workmanlike service. Counsel for appellee stevedoring company admitted that appellee had breached its contract in two respects, failing to stop work and using an unsafe method to discharge the cargo. (R.T. pp 281-82). Certainly had it ceased work the injury would not have occurred. Reasonable men could not differ that it was the admitted failings of appellee which brought into play the unseaworthy condition of the vessel to cause the injury. Appellant was entitled, as a matter of law, to judgment of indemnity and the district court erred in not granting that judgment." (page 677).

This was an action by a vessel owner against a stevedore for indemnity on account of liability incurred to a longshoreman who was injured by reason of a defective winch. Under the stevedoring contract, the vessel owner had the duty to supply adequate winches in good working order, which it failed to do. Despite the fact that the unseaworthiness which led to the longshoreman's injury was attributable to the ship in the first instance, this court affirmed an award of indemnity to the vessel owner because the stevedore, after learning of the defect in the winch, nevertheless proceeded with the work. Indemnity was allowed even though the stevedore had called the vessel owner's attention to the winch's unsatisfactory condition prior to the accident.

"It is to be noted that competence and safety are the essence of the implied obligation of the stevedore to render workmanlike service. Matson was in charge of the stevedoring operations. It is a specialist in that field. Having early secured knowledge of the defective winches, and having continued to use them until Caldwell was injured, with no satisfactory evidence that the unsatisfactory condition had been remedied, falls short of that standard of expertise embodied in its implied obligation to furnish workmanlike service. In our view, in light of the circumstances of this case, the conduct of Sea-Land did not constitute such material breach of its contract so as to preclude it from enforcing the contract of indemnity. *Petus v. Grace Line, Inc.*, supra." (page 686).

A case quite analogous on its facts to the instant case is

Caputo v. U.S. Lines Company (CA 2, 1963)
311 F2d 413, cert. denied, 374 US 833, 83 S Ct 1871, 10 Led
1055

At the trial level, the longshoreman plaintiff was awarded damages against the shipowner because of injuries resulting from the dangerous condition of stowage of cargo, but the stevedore company prevailed on the shipowner's indemnity claim. On appeal, the court held that the finding of improper stowage, together with the established fact that the stevedore continued with its work in the face of such dangerous condition, required a reversal and an award of indemnity to the shipowner.

"The testimony was that the allegedly dangerous condition of the stowage was obvious and that the stevedore nevertheless went ahead with the work. This would constitute a breach of the stevedore's warranty to the shipowner of safe performance of the work and render the stevedore liable for indemnity." (Emphasis supplied) (page 415).

A similar holding is found in

T. Smith & Son, Inc. v. Skibs A/S Hassel (CA 5, 1966)
362 F2d 745

Here a shipowner was held liable to a longshoreman who was injured when he fell into the lower hold because of an ill fitting hatch board. Indemnity over against the stevedore was approved, despite a finding of negligence on the part of the shipowner, because the stevedore continued with the work after acquiring

knowledge of the defective hatch board.

"There is a related rule that defects which are in fact observed cannot be overlooked. If the stevedore has knowledge of a defect it should correct it or require it to be corrected by the ship's officers. Smith v. Jugosalvenska Linijska Plovidica, 4th Cir. 1960, 278 F.2d 176; Santomarcos v. United States, 2nd Cir. 1960, 277 F.2d 255, cert. den. American Stevedores, Inc. v. United States, 364 U.S. 823, 81 S.Ct. 59, 5 L.Ed.2d 52. The defects in the hatch board in this case were known to several of Smith's employees who were members of the same gang as Duvernay, the injured longshoreman. Knowledge of an employee of the stevedore will constitute notice to the employer, and the actual knowledge need not be that of a supervisory employee. Nicroli v. Den Norske Afrika-OG Australielinie, etc., 2nd Cir. 1964, 332 F.2d 651. The stevedore gang had been on the vessel about thirty minutes and the defect was discovered about fifteen minutes before the accident. We cannot adopt Smith's theory that the shortness of these time intervals relieves it of the consequences of its warranty. We do not decide whether or not the longshoremen of Smith should have repaired the defective hatch board. Perhaps their duty was to see that ship's personnel corrected the defect. We think it is clear that it was a breach of Smith's warranty for them to work over the hatch with knowledge of the dangerous condition." (Emphasis supplied) (page 747)

A leading case involving the rights and duties as between a shipowner and master stevedore is

Hugev v. Dampskisaktieselskabet International
(DC Cal, 1959) 170 F Supp 601

In this case Judge Mathes, after an exhaustive analysis of the shipowner-stevedore relationship, concluded that it is a breach of the stevedore's warranty of workmanlike service to continue with loading or unloading

operations after it is aware that conditions exist which make it unsafe to do so, even though the dangerous condition was created by the vessel. The following language taken from this decision is pertinent to the case at bar:

"The stevedoring company's implied-in-fact contractual obligation to perform its duties with reasonable safety embraces not only the handling of cargo, but 'the use of equipment incidental thereto' as well. 355 U.S. at page 567, 78 S.Ct. at page 441. It includes also the duty to suspend the loading or unloading operations on its own initiative, and thus to avoid injury or damage, whenever the stevedore realizes that it would be unsafe under the circumstances to proceed." (Emphasis supplied) (page 608)

* * *

"In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taking thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other parts throughout the world." (Emphasis supplied) (page 609)

* * *

"The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the

stevedoring operations are thereby delayed, the shipowner normally must pay for standby time." (Emphasis supplied (page 610)).

(The above case was affirmed by this court, sub. nom. Metropolitan Stev. Co. v. Dampskisaktieselskabet Int. (CA 9, 1960) 274 F2d 875, cert. denied 363 US 803, 80 S Ct 1237, 4 Led2d 1147).

Another case analogous to the instant case is Simpson v. Royal Rotterdam Lloyd (DC NY, 1964) 225 F Supp 947

where the plaintiff longshoreman sought damages for injuries allegedly caused by improper and unsafe stowage. As in the present case, the evidence indicated that complaint had been made to the hatch boss concerning the condition of the hold and cargo. It further appeared that this condition was actually called to the attention of one of the ship's officers. Nevertheless, the court allowed the shipowner's claim for indemnity because the stevedore, after acquiring knowledge of the unsafe condition, continued to unload the vessel.

"I conclude that Stevedore in this case breached its obligation to Shipowner to perform its services in a workmanlike manner. Although it has been held that there is no duty on the part of a stevedore to inspect a vessel prior to beginning work, Orlando v. Prudential S.S. Corp., 313 F2d 822 (2 Cir. 1963), once a stevedore has knowledge of an unsafe condition, there is an obligation upon the stevedore either to remedy the condition or to cause the ship to do so. (Emphasis supplied) (page 652)

"This obligation of a stevedore includes ordinarily the duty not to continue work until a known dangerous condition has been made reasonably safe. (Emphasis supplied)(page 952)"

* * *

"Stevedore breached its obligation to perform a workmanlike job by continuing to unload the cargo in the condition it was in. Merely showing the unsafe condition to the ship's officer was not sufficient to discharge the obligation of Stevedore, unless the condition was remedied." (Emphasis supplied)(page 953)"

This decision is of particular interest because the stevedoring contract, as in the case at bar (Ex. 31, Sections IX G and H), contained provisions for extra compensation to the stevedore in the event the cargo was not in good order and extra care or effort was needed in order to effect discharge. As the court stated:

"The contract in this case between Shipowner and Stevedore expressly contemplates that cargo may arrive for unloading not in customary good order, in which event Stevedore would be entitled to additional compensation for the extra care and manpower needed to discharge the cargo. The inclusion of an express clause concerning varying conditions in the stow negates any inference of an implied warranty as to the safety of the stow." (page 954).

Nordeutsher Lloyd, Brennan v. Brady-Hamilton
Steve. Co. (DC Or, 1961) 195 F Supp 680

This is another case which is very similar on its facts to the instant case. The shipowner sought indemnity from the stevedore for liability incurred to an injured longshoreman because of improper stowage of cargo. Judge Kilkenney, in awarding indemnity to the

shipowner, stated:

"The respondent's duty under its contract with the libelant included the duty to suspend the loading or unloading operation of its own initiative and thus avoid injury or damage whenever it realized that it would be unsafe to proceed. United States v. Arrow Stevedoring Co., 9 Cir., 1949, 175 F.2d 329, certiorari denied 338 U.S. 904, 70 S.Ct. 307, 94 L.Ed. 557. (page 683)

* * *

"The evidence is clear that the stowage of the crates of glass on the bundles of pipe was improper, that respondent had notice of the dangerous place in which Ough and his fellow workman were compelled to work and that nothing worthwhile was done to protect the men from the hazards of unloading this dangerous cargo. (Emphasis supplied)(page 683)

* * *

"Respondent argues that the judgment in the primary case is not conclusive, in that the specifications of unseaworthiness and negligence in such case related solely to the manner in which the vessel was loaded and that the respondent, as the contracting stevedore, could not be held responsible for those charges. I have already found that respondent was fully aware of the dangerous place in which Ough was required to work. Respondent breached its duty whenever its action brought into play the unseaworthiness of the vessel. Waterman S.S. Corp. v. Dugan & McNamara, Inc., 364 U.S. 421, 81 S.Ct. 200, 5 L.Ed.2d 169; Crumady v. The Joachim Hendrik Fisser, supra." (Emphasis supplied) (pages 684-685).

A good statement of one of the underlying considerations for the rule expressed in the foregoing case is found in

Pacific Far East Line v. California Stevedore & Ballast Co. (DC Cal, 1965) 238 F Supp 956

There the shipowner sought indemnity against the stevedore for liability incurred to a longshoreman who was injured as a result of oil leakage on the deck passageway. The shipowner contended that the stevedore breached its warranty "by continuing to work its stevedoring crew under an unsafe, unseaworthy condition aboard a ship of which condition the respondent had knowledge." The court granted indemnity to the shipowner, stating:

"The great weight of authority allows a shipowner to recover indemnity from a stevedore company which proceeds to work its crew under an unsafe, unseaworthy condition of which the stevedore company has knowledge. The reasoning is that such conduct of the stevedore company brings the unseaworthiness of the ship into play and amounts to a breach of the stevedore's warranty of workmanlike service. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959). See, in this Circuit: *United States v. Rothschild International Stevedoring Co.*, 183 F.2d 181 (9th Cir. 1950); *American President Lines v. Marine Terminals Corporation*, 234 F.2d 753 (9th Cir. 1956); *Hugev v. Dampskisaktieselskabet International*, 170 F.Supp. 601 (S.D. Cal. 1959), affirmed, 274 F.2d 875 (9th Cir. 1960). (page 958).

* * *

"We are of the opinion that the majority rule is preferable because it furthers the primary considerations of avoidance of accidents. The possibility of indemnity over against it by the shipowner will cause a stevedore company to hesitate before risking its crew in an unsafe, unseaworthy condition--as it might do if it could do so with impunity. Presumably, a shipowner, even one whose ship in some respect subjects it to an absolute liability for unseaworthiness, would prefer that work be stopped rather than the condition be "brought into play" by the stevedore

company to the injury of a worker. The stevedore company's warranty of proper workmanship is broad enough to imply that it will not proceed in the face of a known, dangerous condition. Its clear obligation is to either remedy the condition, or have the ship remedy it or, if necessary, refuse to subject workers to the risk of injury--an obligation analogous to the obligation to exercise the 'last clear chance' as recognized by the law of torts."
(Emphasis supplied)(page 959)

The testimony of Stevedore's walking boss Cecil Finley (Tr. 239) to the effect that the method of discharge being used was the "most proper" and "the only practical way" provides no basis for arguing that the Stevedore's duties, as set out in the foregoing authorities, were somehow lessened in this case. In the first place, the evidence heretofore reviewed demonstrates beyond doubt that, if the method being used was unduly hazardous, there were other methods available which could have reduced the risk. In any event, even if it is assumed that there was absolutely no other method of discharging this cargo than that which was employed, Stevedore still had the duty to discontinue the work if its employees were thereby exposed to an unreasonable risk of harm.

Crescent Wharf & Warehouse v. Compania Naviera
De Baja Calif. (CA 9, 1966) 366 F2d 714

"If, as contended by Crescent, there was no other method or means of loading the vessel than the one employed, then we do not believe Crescent was justified in carrying on a loading operation which it knew to be dangerous. It was aware of the possibility of a flange being pulled loose. The procedures of loading prior

THE SECRETARY OF THE
TREASURY
WASHINGTON
D. C.
JANUARY 1, 1900

THE SECRETARY OF THE TREASURY

DEAR SIR: I have the honor to acknowledge the receipt of your letter of the 29th inst. in relation to the proposed issue of \$100,000,000 of United States bonds, and in reply to inform you that the same has been referred to the proper authorities for their consideration. I am, however, unable to give you any definite information as to the result of their action at this time. I am, nevertheless, sure that the Government is fully prepared to meet the requirements of the situation, and that the proposed issue of bonds will be successful.

Very respectfully,
J. M. [Signature]
[Title]

to the time the flange was hammered back and subsequent thereto were not changed. The loading gear still continued to catch or strike the metal flange the same as it had prior to the stoppage of work. There was no attempt to avoid the known danger by the use of another method or stopping the work until it could be definitely determined that there was no danger from the catching and rubbing of the gear on the flange." (Emphasis supplied)(page 719)

It thus appears, from the undisputed evidence and the most explicit pronouncements of this and other courts which have considered the identical issue, that Shipowner is entitled to indemnity in this case.

2. The trial court erred in failing to give Shipowner's Requested Instructions Nos. 18, 19, 21 and 22.

In the event it should be determined that Shipowner is not entitled to indemnity as a matter of law as urged hereinabove, it becomes necessary to examine the propriety of the trial court's rulings with respect to certain of the instructions requested by Shipowner on the indemnity issue.

These instructions (set out verbatim at pages 10-12, supra) would have advised the jury as follows:

No. 18. That if the jury should find against Shipowner because the Stevedore-furnished pickup sling was inadequate or unsafe, as charged by plaintiff, then Shipowner would be entitled to indemnity.

No. 19. That if the jury should find against Shipowner because of unseaworthy stowage and if the jury further should find that Stevedore

was aware of the manner of stowage but failed to stop work or remedy the condition before proceeding with the discharge, then Shipowner would be entitled to indemnity.

No. 21. That if the conditions surrounding the discharge rendered the operations unsafe it was the duty of Stevedore to stop such operations when it reasonably appeared that to proceed would be unsafe; that if the jury should find that Stevedore knew or should have known of such unsafe conditions and did not suspend or stop the discharge operations, then Shipowner would be entitled to indemnity.

No. 22. That although a shipowner might be initially responsible for an unseaworthy condition, a stevedore which has undertaken to discharge cargo still owes the duty to the shipowner, when it knows or has reason to know of such unseaworthy condition, to suspend or stop work until the work can proceed in safety; that if the jury should find that Stevedore knew or should have known of any unseaworthy condition which rendered it unsafe to work, its failure to suspend or stop work until it could safely resume would entitle Shipowner to indemnity for any liability which would not have occurred had the work been stopped; that if a stevedore brings an existing unseaworthy condition into play either by utilizing an unsafe method or by continuing when it knows or should know that it is unsafe to do so, its obligation to the shipowner is thereby breached.

Shipowner can only state that these instructions embody correct statements of the law, as reflected by the authorities hereinabove set forth, and that the court's failure to give them (assuming, arguendo, that Shipowner was not entitled to prevail on the indemnity claim as a matter of law) obviously deprived it of the right to have its theory of the case presented to the

jury by proper instructions. As pointed out earlier, this is prejudicial error under the rule in

Blassingill v. Waterman Steam-
ship Corporation (CA 9, 1964)
336 F2d 367, 368

It has been held to be reversible error not to give instructions similar to these in a maritime indemnity case of this type.

Dziedzina v. Dolphin Tanker Corp. (CA 3, 1966)
361 F2d 120

"Here specifically it was incumbent upon the court to point out that knowledge of the unseaworthy condition in Dolphin did not defeat its right of indemnity against Atlantic. The court also had the duty to explain to the jury that even if the stevedore acts in a non-negligent manner, his warranty of workmanlike service is breached where such actions make the unseaworthiness of the vessel operative. These principles of Maritime Law are unique and distinct from the Common Law standards and for this reason, the District Court must be explicit; such was not the case here.

* * *

"Finally the court below failed to adequately cover in its general charge point #9 requested by Dolphin. The thrust of this point was aimed at making the jury aware that the right of indemnity exists where a preexisting condition of unseaworthiness was brought into active play by the action of the stevedore. The import of this point is obvious under the factual circumstances of this case." (Emphasis supplied)(page 123).

The trial court's failure to give these requested instructions, coupled with the fact that the only instruction which was given with respect to Stevedore's obligations to Shipowner was simply the general charge that Stevedore had the duty to perform its work in a skillful, safe and workmanlike manner, resulted in the jury's being left entirely unadvised on the points which were really critical to the indemnity claim. The jury received no instruction whatever on such pivotal matters as Stevedore's duty to furnish safe appliances and utilize safe methods, its duty to stop work in the face of unduly hazardous conditions, whether or not the same were created by Shipowner, and the "bringing into play" doctrine.

Shipowner submits that this falls far short of being a fair presentation of its theory of the case.

3. The trial court erred in failing to submit the factual issues to the jury by means of the requested special verdict form.

Shipowner requested that the court utilize a verdict form consisting of special interrogatories (R. 83-84). The court, indicating that general verdicts were preferable, declined to do so (Tr. 266).

It is recognized that the choice of verdict form is a matter within the trial court's discretion and that, ordinarily, a court's decision in this respect would

not constitute error. However, it was felt, in view of this court's rather strong admonition in

Koivunen v. States Line
(CA 9, 1967) 371 F2d 781, 783

concerning the desirability of special interrogatories in this type of case, together with the lack of explicit direction to the jury reflected in the instructions as a whole, that this was perhaps that exceptional case where the use of a general verdict would be error.

CONCLUSION

Based upon the propositions and authorities set forth hereinabove, Shipowner respectfully urges:

1. The judgment below in favor of plaintiff and against Shipowner should be vacated and a new trial ordered as between plaintiff and Shipowner.
2. The judgment below in favor of Stevedore and against Shipowner should be reversed and judgment entered in favor of Shipowner on its indemnity claim.
3. In the event the court determines that Shipowner is not entitled to entry of judgment on its indemnity claim, the

indemnity case should be remanded for
new trial.

Respectfully submitted,

KING, MILLER, ANDERSON, NASH & YERKE

CURTIS W. CUTSFORTH

1200 American Bank Building
Portland, Oregon 97205

Attorneys for Defendant-Appellant
JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD.

APPENDIX

EXHIBIT No.	OFFERED	IDENTIFIED	RECEIVED
1A	Tr. 54-55	Tr. 55	Tr. 57*
1D	Tr. 54-55	Tr. 55	Tr. 57*
1E	Tr. 54-55	Tr. 55	Tr. 57*
1F	Tr. 54-55	Tr. 55	Tr. 57*
1H	Tr. 54	Tr. 54	Tr. 54
2	Tr. 40	Tr. 40	Tr. 40
4	Tr. 7	Tr. 7	Tr. 7
5	Tr. 59	Tr. 59	Tr. 59
31	Tr. 236	Tr. 236	Tr. 236
32A	Tr. 248	Tr. 248	Tr. 249
32B	Tr. 248	Tr. 248	Tr. 249

*Objection to admission of exhibit overruled.

No. 22184

United States
COURT OF APPEALS
for the Ninth Circuit

JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD., a foreign corporation,
Defendant and Third Party Plaintiff-Appellant,

v.

WAYNE CRAWFORD,
Plaintiff-Appellee,

BRADY-HAMILTON STEVEDORE COMPANY,
a corporation,
Third Party Defendant-Appellee.

APPELLEE'S BRIEF

*Appeal from the Final Judgment of the United States
District Court for the District of Oregon*

THE HONORABLE ROBERT C. BELLONI, Judge

GRAY, FREDRICKSON & HEATH
NATHAN J. HEATH

421 S. W. Sixth Avenue
Portland, Oregon 97205

*Attorneys for Brady-Hamilton
Stevedore Company*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE.

FILED

FEB 19 1968

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FILED 1968

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United States
COURT OF APPEALS
for the Ninth Circuit

JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD., a foreign corporation,
Defendant and Third Party Plaintiff-Appellant,

v.

WAYNE CRAWFORD,
Plaintiff-Appellee,

BRADY-HAMILTON STEVEDORE COMPANY,
a corporation,
Third Party Defendant-Appellee.

APPELLEE'S BRIEF

*Appeal from the Final Judgment of the United States
District Court for the District of Oregon*

THE HONORABLE ROBERT C. BELLONI, Judge

STATEMENT OF JURISDICTION

This suit was commenced by Complaint filed October 4, 1966, in the United States District Court for the District of Oregon. Jurisdiction was based upon diversity of citizenship between plaintiff and defend-

ant and the requisite amount in controversy. Jurisdiction was properly invoked under 28 U.S.C., § 1332. The facts upon which jurisdiction is based are set out at page of the Pre-trial Order (R. 12).

Third Party Defendant was impleaded pursuant to Rule 114(a), Federal Rules of Civil Procedure.

Motion of Defendant for judgment n.o.v. was denied July 10, 1967 (R. 10). Notice of Appeal from such order and the entire judgment was filed August 8, 1967 (R. 95). Jurisdiction of this Court is based on 28 U.S.C. § 1291.

SUMMARY OF ARGUMENT

Judith Ann Liberian Transport Corporation, Ltd., (vesselowner) claims it is entitled to indemnity as a matter of law. It claims that either (1) furnishing a sling of a wrong type or (2) proceeding to work in the face of an unseaworthy stow requires indemnity as a matter of law without any jury question. Brady-Hamilton Stevedore Company (stevedore) has a constitutional right to a jury determination as to whether it rendered a substandard performance constituting a breach of its contract. Having a verdict in its favor, stevedore is entitled on appeal to have the evidence viewed in the light most favorable to it. Moreover, the verdict must be taken as consistent if such a view of the case is possible.

There was ample evidence upon which the jury could have rejected the claim the sling furnished was

improper. And even if it had been found to be improper, there remained the fact question of whether stevedore was unskillful or unworkmanlike in supplying it.

There was an abundance of evidence to justify a finding of unseaworthiness based upon improper stow. Given the condition of the stow, the stevedore proceeded with discharging the cargo in the only practicable method possible. The jury was amply justified in finding the stevedore did not breach its contract by proceeding with the work.

The danger was created by the vesselowner. No remedial action could have been taken by the stevedore. Stopping work could only have resulted either in a different stevedore doing the work or the cargo remaining in the vessel forever. In these circumstances the loss should fall on the vesselowner who was in the position best suited to adopt preventive measures to avoid the accident.

ARGUMENT

The main thrust of the vesselowner's argument is the assertion the stevedore is liable for indemnity as a matter of law. Vesselowner asserts the trial court should have directed a verdict against the stevedore or granted a motion for judgment n.o.v.

There were two allegations of unseaworthiness made by the plaintiff (R. 13). The verdict was general (R. 81). The vesselowner was held liable for breach of the warranty of seaworthiness either be-

cause an improper type of sling was used or because the stowage of cargo was dangerous. Vesselowner asserts that under either allegation of unseaworthiness it is entitled to indemnity as a matter of law without a factual finding by the jury. Stevedore, having a favorable jury verdict, is entitled to have the evidence viewed on appeal in the light most favorable to it. *Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne*, 386 F.2d 193 (C.A. 4, 1967). The verdict must be taken as consistent if such a view of the case is possible. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 1962 AMC 565 (1962).

The Sling

There was ample evidence in support of the following view of the facts: Because of the manner in which the cargo was stowed, it was necessary to use a pick-up sling in the discharge of the cargo (Tr. 65, 81, 123, 148, 239). Indeed, that was the only practicable method available (Tr. 73, 123, 239). There are two types of pick-up slings. The one in general use is a relatively thin wire rope (Tr. 250). It has an eye spliced in each end. The eyes are placed over the cargo hook and the load cradled in the resulting loop (Tr. 149). It was referred to at the trial as a "cradle" sling.

The other type of pick-up sling is also of small wire rope. It has an eye in one end and a hook on the other. The eye is placed over the cargo hook. The

sling is looped around the load and the hook is hooked around the sling. The weight of the load tends to tighten the sling (Tr. 149). It was referred to as a "choker" sling.

A pick-up sling is the customary method of discharging used in similar situations and is the only practical method (Tr. 239, 240, 249). The choker sling cannot be used successfully because it tends to bind on the load and, therefore, will not perform its function of pulling under the load (Tr. 239, 240, 250, 251). The cradle sling is safer than the choker (Tr. 240).

The witnesses who testified to these facts were well qualified to do so (Tr. 237, 238, 247, 248). The jury had ample justification to conclude the stevedore company did not breach its contract in providing a cradle-type pick-up sling.

Even if the jury found the vessel unseaworthy by reason of the sling, indemnity would not have followed automatically. There was no contention or testimony that the sling was defective in any manner. It did not part or fail in service. This case, therefore, is unlike *Italia Societa per Azione v. Oregon Stevedore Co.*, 376 U.S. 315, 1964 AMC 1075 (1964), where the

"... issue presented is whether the warranty is breached where the stevedore has nonnegligently supplied defective equipment which injures one of its employees during the course of stevedoring operations." (pp. 315, 316)

The issue here differs considerably. The considerations of care and testing of equipment cited by the court do not apply here. Unlike *Italia* where the rope was wholly unavailable to the vesselowner for inspection, in this case the agent of the vessel and the supercargo had actual knowledge of the type of sling being used (Tr. 215, 226). They had ample opportunity to stop the work if he deemed it improper, did not do so (Tr. 226, 227).

Whether a particular piece of gear is a proper tool is a question of judgment. Selection of equipment is an integral part of the selection of method of working. Method of working is a matter of skill and judgment. Skill and judgment are the essence of the stevedore's undertaking. It is a question of fact whether that undertaking is breached. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, *supra*. Where the stevedore furnishes equipment that fails in service *Italia* requires a finding of breach of contract per se. But where the stevedore's skill and judgment are questioned, the issue is one of fact.

Improper Stowage of Cargo

The vesselowner correctly asserts the vessel necessarily was found unseaworthy either because of the sling or the condition of cargo stowage. Again, the vesselowner assumes that if the stow was unseaworthy, the stevedore is liable for indemnity as a matter of law for proceeding with the discharge operation.

Whether or not the stevedore has breached its warranty of safe and workmanlike service again is a question of fact. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 1962 AMC 565 (1962). The stevedore in a diversity jurisdiction case according to *Ellerman* is guaranteed a jury determination of this question by the Seventh Amendment.

There was ample testimony in support of the conclusion the vessel was unseaworthy because of a poor stow (Tr. 59-61, 76, 116, 129, 181, 182, 197, 198, 242). There was also considerable testimony as to how the stow might have been made better (*ibid*). Simply because there was a safer method of stowage available to the vesselowner did not render the stevedore's discharge of the poorer stow unworkmanlike per se. To so hold would be to invite poor, unsafe stowage in favor of good, safe stowage by the vesselowner. The vesselowner would thereby gain the advantage of having the stevedore be the insurer in the discharge through the vesselowner's fault. The question is whether in all the circumstances the work of the stevedore was substandard. The stowage was poor but the stevedore in this case approached the job in the only practicable manner (Tr. 73, 123, 148, 226, 227, 239, 249).

Where a winch is defective or oil is spilled on the deck it is only common sense, in most circumstances, to stop work until the dangerous situation is corrected. Even with defective winches or oil spills it is easy to imagine circumstances wherein proceed-

ing with the work could not be said to be unworkmanlike. It is a question of fact. Compare *Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne*, 386 F.2d 193 (C.A. 4, 1967), where there was an obvious remedy available which made stopping work a reasonable precaution.

In the instant case there was no evidence that stopping work offered a reasonable alternative. There was no evidence that any remedy whatsoever was available to alleviate the danger arising from the method of stowage. The method of discharge employed by the stevedore was the only practicable one (Tr. 73, 123, 148, 226, 227, 239, 249). The alternative to proceeding in this manner was to leave the cargo in the vessel forever, an alternative clearly not justified by the danger to be apprehended (Tr. 87, 88, 203, 226). Or if Brady-Hamilton Stevedore did not discharge the steel, some other stevedore in Portland, Oregon, or some other port would have. Perhaps the crew would have been called upon to perform the discharging operation. (The same longshoremen who complained of the stow would, no doubt, have picketed the vessel if the crew rather than longshoremen had been employed to perform the discharge.) Somewhere, sometime, some men would have been exposed to the added hazard created by the stowage. The same type of stow and the same method of discharge are not uncommon (Tr. 87, 88, 203, 226). In all of the foregoing circumstances, the jury

was easily justified in concluding the stevedore had not breached its contract; but, in fact, it had worked safely, expertly and in a workmanlike manner.

The cases cited by the vesselowner do not justify the conclusion asserted that liability follows as a matter of law. In every case cited by the vesselowner, except one, the finder of fact found a breach of contract—a negligent or substandard service. The finder of fact in the instant case was privileged but not compelled under the applicable law to find a breach of contract. It did not do so.

Crumady v. "Joachim Hendrik Fisser", 358 U.S. 423, 1959 AMC 580 (1959) is mis-cited by the vesselowner. Nothing in the facts given in *Crumady* justifies the conclusion the stevedore knew the cut-off device was improperly set for twice the safe working load of the boom. The stevedore was held negligent, not for proceeding in the face of a known danger, but for improperly positioning the head of the boom, causing undue strain on the gear. The "brought the unseaworthiness into play" language of *Crumady*, so often cited in subsequent cases, includes fault as an integral part. The stevedore was held liable not simply for bringing the unseaworthiness into play but because:

"We conclude that since the negligence of the stevedores, which brought the unseaworthiness of the vessel into play, amounted to a breach of the warranty of workmanlike service, the vessel may recover." (p. 429).

In *Rederi A/B Nordstjernen v. Crescent Wharf & Warehouse Co.*, 372 F.2d 674, 1967 AMC 1036 (C.A. 9, 1967) the stevedore admitted it had breached its contract. The question was whether the conduct of the vesselowner was sufficient to preclude indemnity. That issue was not raised in the instant case. The sole issue here is whether the stevedore breached its contract. The jury found it had not.

In *Matson Terminals, Inc. v. Caldwell*, 354 F.2d 681, 1966 AMC 624 (C.A. 9, 1965) there is a specific finding of fact by the trial court that the stevedore breached its contract in proceeding to use a winch without ascertaining whether it had been repaired.

In *T. Smith & Son, Inc. v. Skibs A/S Hassel*, 362 F.2d 745, 1966 AMC 1700 (C.A. 5, 1966) there was a jury verdict against the stevedore company; necessarily a finding of fact of breach of contract.

In *Hugev v. Damp, Int.*, 170 F. Supp. 601, 1959 AMC 439 (S.D. Cal., 1959), Judge Mathes, sitting without a jury, specifically found that the stevedore breached its contract.

In *Simpson v. Royal Rotterdam Lloyd*, 225 F. Supp. 947, 1964 AMC 1171 (S.D. N.Y., 1964) the trial court found as a fact that the stevedore breached its obligation to perform in a workmanlike manner by continuing to discharge greasy tin ingots without performing, or insisting on, a thorough cleaning of them.

In *Nordeutscher Lloyd Brennan v. Brady-Hamil-*

ton Stevedore Company, 195 F. Supp. 680, 1961 AMC 2285 (D. Or. 1961), there was considerable testimony concerning how the stevedore might have secured crates of glass to prevent their falling over during discharge operations. The trial court found the stevedore breached its contract in failing to discharge cargo in a safe and proper manner and in being negligent.

In *Pacific Far East Line v. California Stevedore & Ballast Co.*, 238 F. Supp. 956 (N.D. Cal., 1965) the court found a breach of contract in continuing to work where there was known to be oil on the deck.

In *Crescent Wharf & Warehouse v. Compania Naviera de Baja, California*, 366 F.2d 714, 1966 AMC 2670 (C.A. 9, 1966) there was a specific finding by the trial court of negligence and breach of contract.

In *De Van v. Pennsylvania R. R. Co.*, 167 F. Supp. 336, 1959 AMC 426 (E.D. Pa. 1958), the trial court found a breach of warranty.

In *Mosley v. Cia. Mar. Adra S.A.*, 326 F.2d 118, 1966 AMC 2017 (C.A. 2, 1966), cert. denied 385 U.S. 933, 1966 AMC 2787 (1966), the jury's verdict favored the stevedore but was set aside by the trial court. In that case the entire situation constituting unseaworthiness was created solely by the stevedore company. Even so, the case is probably wrong and in conflict with *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, supra. *Mosley* even if correct, would not be controlling in the instant case.

In *Caputo v. U.S. Lines Company*, 311 F.2d 413, 1963 AMC 1921 (C.A. 2, 1963) was there liability fixed on the stevedore without a prior finding of fault by the trier of fact. However, that case can hardly be said to stand for the proposition that the stevedore company can be held liable without a factual determination of substandard performance. The principal issue in *Caputo* was whether the trial court in the indemnity case might make a finding inconsistent with the jury's verdict in the principal case. The Court of Appeals held it may not. The Court of Appeals then reversed with directions to enter judgment against the stevedore. The question of the propriety of doing so without a finding of fact of breach of contract was not discussed. The failure to obtain a finding of fact appears to have been overlooked rather than declared unnecessary.

Instructions

The vesselowner also complains the trial judge failed to give proper instructions as requested. Requested instruction No. 18 is printed on page 10 of vesselowner's brief and at page 66 of the Record. The court was correct in refusing the instruction. The instruction omits the essential element of breach of contract by substandard performance. As noted above (p. 6), the selection of equipment is a matter of skill and judgment. The stevedore's liability springs not from being wrong but from being unskilled, unworkmanlike or negligent. This instruc-

tion does not appear to differ from the position taken by vesselowner that it is entitled to a directed verdict. Moreover, the reference to the "condition" of the sling was misleading. The condition or state of repair was not in issue.

Requested Instruction 19 (page 10 of vesselowner's brief, page 67 of Record) is defective for the same reason—omission of the element of breach of contract by substandard performance. The portion of the instruction relating to stopping work is not applicable under the evidence since there was no evidence whatsoever that stopping work would have been a reasonable alternative. Certainly, as discussed above, it cannot be said, as the instruction reads, that liability follows as a matter of law.

Requested Instructions Nos. 21 and 22 (vesselowner's brief 11, 12, R. 69, 70) are merely restatements of Requested Instructions Nos. 18 and 19.

The various rules concerning stevedore indemnity are fashioned to place liability on the party "best situated to adopt preventive measures and thereby to reduce the likelihood of injury". *Italia Societa per Azione v. Oregon Stevedore Co.*, supra. Most of the cases that have come before the courts have presented fact situations in which the stevedore was "best suited to adopt preventive measures". This case graphically illustrates that the principle is not a one-way street. Here the vesselowner at the time of loading

purchased cheaper and less satisfactory dunnage (Tr. 133, 183, 220) thereby rendering the discharge hazardous. The stevedore was faced with the alternatives of (1) refusing to work, whereupon a different stevedore would no doubt have proceeded to work, or the cargo would have lain in the hold forever, or (2) proceeding with the work in the customary and only practicable manner as would any stevedore in the world (Tr. 148). Where a dangerous situation can be remedied the stevedore should do so. But the vice here was in the loading and nothing the stevedore could have done would have been remedial. The vesselowner should not be able to escape its culpability.

Special Verdict Form

The special verdict was clearly discretionary with the trial court. *Koivunen v. States Line*, 371 F.2d 781, 1967 AMC 2152 (1967). Circumstances here were different than in *Koivunen*. The trial court rejected the request because of the difficulties of application (Tr. 266).

CONCLUSION

The evidence in this case clearly presented questions of fact for the jury. These were properly submitted and resulted in a verdict for the stevedore. The judgment rendered on the verdict should be affirmed.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH
NATHAN J. HEATH
Attorneys for Appellee
Brady-Hamilton Stevedore Co.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NATHAN J. HEATH
Attorney for Appellee
Brady-Hamilton Stevedore Co.

No. 22184

United States
COURT OF APPEALS
for the Ninth Circuit

JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD., a foreign corporation,
Defendant and Third Party Plaintiff-Appellant,

v.

WAYNE CRAWFORD,
Plaintiff-Appellee,
BRADY HAMILTON STEVEDORE
COMPANY, a corporation,
Third Party Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLEE

*Appeal from the Final Judgment of the United
States District Court for the District of Oregon*

THE HONORABLE ROBERT C. BELLONI, Judge

POZZI, LEVIN & WILSON
RAYMOND J. CONBOY

808 Standard Plaza
Portland, Oregon 97204

Attorneys for Plaintiff-Appellee **FEB 29 1968**
Wayne Crawford

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Third Party Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLEE

*Appeal from the Final Judgment of the United
States District Court for the District of Oregon*

THE HONORABLE ROBERT C. BELLONI, Judge

STATEMENT OF JURISDICTION

The plaintiff filed this action on October 4, 1966,
in the United States District Court for the District
of Oregon (R. I, 1). Diversity of citizenship was
alleged in the complaint, admitted by answer, and

set forth as an agreed fact in the pretrial order (R. I, 1, 3, 12). It was also alleged in the complaint, admitted by answer, and set forth as an agreed fact in the pretrial order that the amount in controversy exceeded the sum of \$10,000, exclusive of interest and costs (R. I, 1, 3, 12). Accordingly, the District Court had jurisdiction of the cause between plaintiff and defendant by virtue of 28 USCA § 1332.

On November 15, 1966, the defendant filed a third-party complaint against Brady-Hamilton Stevedore Company alleging facts which, if proved, would entitle defendant to indemnification from the third-party defendant for any damages recovered by the plaintiff (R. I, 5). Jurisdiction of the District Court over the subject matter of the third-party complaint was based upon 28 USCA § 2072 and Rule 14 of the Federal Rules of Civil Procedure.

The plaintiff's action against the defendant and the defendant's action for indemnity against the the third-party defendant were both tried before the Honorable Robert C. Belloni, sitting with a jury, on June 13 and 14, 1967. The jury returned a verdict for damages in favor of the plaintiff and against defendant and by a separate verdict found that the defendant was not entitled to indemnity from Brady-Hamilton Stevedore Company (R. I, 81, 82). Judgment was entered on both verdicts on June 14, 1967 (R. I, 85).

On June 26, 1967, the defendant filed a motion for judgment notwithstanding the verdict or in the

alternative for a new trial against both the plaintiff and the third-party defendant (R. I, 86). The defendant's motion was denied by order of the District Court entered on July 10, 1967 (R. I, 93). The defendant thereafter filed timely notice of appeal on August 8, 1967 (R. I, 95) pursuant to Rule 73(a), Federal Rules of Civil Procedure.

Accordingly, this Court has jurisdiction to review the judgment of the District Court under the provisions of 28 USCA § 1291.

STATEMENT OF THE CASE

A. Preliminary Statement.

This appeal involves two incompatible lawsuits which, at the defendant's election, were tried before one jury. The plaintiff-appellee, a longshoreman, sued the defendant shipowner for injuries caused by unseaworthiness of the vessel which he was employed in unloading. The shipowner impleaded the stevedore, denying that the ship was unseaworthy, but contending that any unseaworthiness found to exist was caused solely by the stevedore's negligence and violation of contractual duty. On this appeal, the defendant challenges the judgment entered upon jury verdict, which: (1) imposed liability and damages and (2) refused indemnity. It is solely with the first aspect of the judgment that the plaintiff-appellee is concerned. Accordingly, we believe that the statement of the case demands a somewhat different emphasis

than supplied by the defendant, and substitute the following statement.

B. Nature of the Action.

The plaintiff brought this action for personal injuries which he suffered while unloading cargo from the hold of the vessel JUDITH ANN, owned by the defendant Judith Ann Liberian Transport Corporation, Ltd. Steel rods, being lifted at one end by a cradle-type pickup sling, slipped from the sling and hurled a large block of wood into the plaintiff's face and eye.

The plaintiff proceeded solely upon a theory of unseaworthiness. His contentions, set forth in the pretrial order, were as follows:

"1. . . . the cargo which plaintiff was required to discharge was improperly stowed, in that it was not properly blocked, in that the dunnage was insufficient and inadequate, in that it was necessary to use a pickup sling in order to discharge it, and in that it was so located that it could not be safely discharged.

2. . . . the pickup sling being used to discharge the vessel was not provided with a proper hook or other securing device to keep it from slipping." (R. I, 13).

The defendant denied liability, and in turn alleged that plaintiff was contributorily negligent in certain particulars (R. I, 14). In addition the defendant impleaded Brady-Hamilton Stevedore Company, asserting that the defendant was entitled to in-

demnity from the stevedore if required to pay damages to the plaintiff (R. I, 5, 14, 15).

C. Summary of Facts.

The vessel JUDITH ANN is a tramp freighter of Liberian registry which, at the time of the plaintiff's injury, was being operated under a time charter by Shinto Corporation, a Japanese company (R. IV, 219, 220). The vessel had picked up a cargo of steel at Yawata, Japan, which was being unloaded onto the dock at Portland, Oregon (R. IV, 220, 223, 225, 228, 229).

The plaintiff, who was fifty-two years of age at the time of trial, began working as a longshoreman upon graduation from high school, and when injured was working as a holdman, carrying cargo and sling loads (R. III, 5-8). On May 3, 1966, the plaintiff was working in the hold at the No. 4 hatch of the JUDITH ANN (R. III, 51). His gang was engaged in unloading bundles of "rebar" or "reinforcing" steel, limber steel rods approximately twenty feet in length (R. III, 58, 59, 79, 117, 159; R. IV, 234, 252). The cargo was being hoisted from the hold to the dock by dockside gantry, or "whirly", cranes. The ship's winches and booms were not in use (R. IV, 53).

Four longshoremen, two walking bosses, a supercargo, and a ship's master and cargo surveyor testified that the rebar steel was improperly stowed (R. III, 51, 58-61, 76, 81, 114, 116, 125, 126, 129, 132-

134, 142, 143; R. IV, 178, 182, 190, 192, 197, 198, 237, 242-244). According to these witnesses, flexible steel rods should be and generally are stowed in tiers on 4 x 4 inch pieces of wooden dunnage. This is horizontal blocking. Dunnage also separates the steel vertically at convenient intervals. This kind of stow permits the holdmen to get heavy hoisting slings around the bundles of steel without resorting to the use of pickup slings or other makeshifts to get the bundles into position where hoisting slings can be put around them (R. III, 59, 60, 72, 76, 81, 116, 129, 132, 134-136, 142, 143, 157, 169; R. IV, 182, 190, 197, 198, 242-244). An average load for hoisting would number seven or eight bundles of steel rods (R. III, 61). The JUDITH ANN was not using 4 x 4 inch dunnage. The only dunnage consisted of some short, broken up pieces of wood, estimated to be between one-quarter and one inch in thickness (R. III, 60, 76, 116; R. IV, 182, 197, 231). Dunnage is purchased by the ship, and four-by-four inch blocks are more expensive than scrap wood (R. III, 133; R. IV, 183). The large blocks are available in Japan (R. III, 133; R. IV, 187, 233). Lack of proper dunnage aboard the JUDITH ANN prevented hoisting slings from being worked under and around the bundles of steel (R. III, 58-61, 76-77, 116).

In order to get hoisting slings in place it was necessary to raise one end of the steel rods by means of a "pickup" sling. A "cradle" sling was being used for this purpose. This was described as a wire sling with an eye spliced in either end, which is worked under

one end of the load to be picked up, and attached by the eyes to the crane hook (R. III, 61-63, 72, 81; R. IV, 190, 239). In order to force the cradle sling a few inches under one end of the bundled steel, the plaintiff's gang used prying bars. The sling was then tightened by the crane and generally worked under the load a few inches more (R. III, 61, 62). The next step was to lift the load three or four feet at the secured end while the holdmen attached hoisting slings (R. III, 61, 62, 63, 79, 81). Before approaching the sagging load, the men would wait for a few seconds to determine that the lift was stable (R. III, 62, 63; R. IV, 217).

The plaintiff's gang had been discharging other cargo from the No. 4 hatch in the morning, and began to work on the steel rods at about 1:00 p.m. (R. III, 52, 53). One load of steel bundles had been removed from the hold and the longshoremen were working on the second load when the plaintiff was injured (R. III, 53). One end of the second load of steel bars had been raised to a height of three or four feet with the pickup sling in preparation for putting hoisting slings around the load (R. III, 62, 63). The load rested in the cradle of the sling for a short time, when several of the rods started to slip out, followed by the whole load (R. III, 63, 80, 117; R. IV, 213, 214). The falling steel struck a four-by-four inch timber, hurling it against the plaintiff's face and forearm (R. III, 80; R. IV, 214).

There was testimony that use of a cradle type

pickup sling was improper. Witnesses testified that one or more varieties of "choker" sling, designed to tighten on the load as it is raised, were available and should have been used even though no sling used for pickups is completely safe (R. III, 83, 165, 167, 168, 169; R. IV, 190, 191, 198, 230, 242, 243, 244).

According to the plaintiff's witnesses, a cradle-type pickup sling was dangerous because, at best, the steel rods against the steel sling presented a slippery condition, which was aggravated by the flexibility of the rods (R. IV, 189-191, 229, 230, 242, 243). Witnesses testified that there is always some slight movement of the ship while it is berthed at the dock (R. IV, 244). Steel was being discharged from the No. 3 hatch at the same time that the plaintiff was working in the No. 4 hatch, and lifting of steel from the hold, especially when done by a shore based gantry crane, causes the vessel to lurch slightly (R. IV, 229).

The defendant called only one expert witness, the supercargo of the JUDITH ANN, who was willing to testify that in his opinion the stow was proper, although on cross-examination he admitted that better blocking could have been used and that it is dangerous to use a pickup sling (R. IV, 222, 226, 229, 230). Otherwise the defense consisted largely of cross-examining the plaintiff's witnesses to determine that they had, from time to time, unloaded other steel ships with dunnage of a kind similar to that used on the JUDITH ANN (R. III, 70, 82, 86, 146, 157; R. IV, 186, 203, 241). We have already observed that

these witnesses uniformly testified such a stow was improper and dangerous.

The plaintiff suffered severe injuries. One eye was crushed and had to be removed (R. III, 12, 106-108). There was facial disfigurement which, even after surgery, was quite marked and will be permanent (R. III, 11, 12, 40-47). As a direct result of his injury, the plaintiff developed a condition of thrombophlebitis in his right leg, which resulted in a permanent venous insufficiency. The plaintiff was unable, at the time of trial, to walk more than one block at a time, required continuing medical treatment with anticoagulant drugs, and risked further serious injury to the leg in the event of any minor trauma (R. III, 16, 17, 91-98). The plaintiff also suffered a brain concussion, with continual noises in his head, headaches, dizziness and memory loss (R. III, 14-16). A physician identified this condition as post-traumatic head syndrome, which would tend to clear as time went on, although the doctor could not say to what extent (R. III, 22, 24-30, 31, 32). As a consequence of his injuries, the plaintiff is permanently disabled from returning to work on the waterfront (R. III, 28).

D. Nature of the Judgment.

The jury returned a verdict in favor of the plaintiff against the defendant in the sum of \$194,058.55. No motion for remittitur was made below, and no party to this appeal contends that the amount of the

judgment was excessive in light of the plaintiff's injuries. The jury also found that the defendant was not entitled to indemnity from the stevedore (R. I, 82). Judgment was entered upon both verdicts (R. I, 85).

E. Questions Presented on Appeal.

With respect to the defendant's appeal from the judgment in favor of the plaintiff, the plaintiff accepts the statement found in the Appellant's Brief that ". . . the questions presented concern the propriety of the District Court's action in giving certain of the plaintiff's requested instructions, and in refusing to give certain instructions requested by shipowner." (App. Br. 5). The plaintiff, of course, takes no position with respect to the defendant's indemnity claim against the stevedore.

SUMMARY OF ARGUMENT

The defendant contends that the court erred in giving two instructions requested by the plaintiff and in failing to give two instructions requested by the defendant.

The instructions given were correct statements of applicable law and were amply supported by evidence. Furthermore, a consideration of the instructions as a whole shows that the jury could not have been misled even if the defendant were correct (as it was not) in asserting that the requested instructions contained isolated words or phrases likely to produce confusion.

The defendant's requested instructions were both wrong and the lower court would have committed prejudicial error had it given either of them. One of the requested instructions would have told the jury that a shipowner cannot be held liable for an unseaworthy stow if the stevedore uses customary methods of unloading the vessel, thereby creating an unreasonable risk to the workmen because of the improper stow, when other and safer methods of discharge were *available* but not actually *used* by the stevedore. The other requested instruction would have directed the jury to find as a matter of law that the stow was not unseaworthy, although the evidence of an improper stow was virtually conclusive and the court would have been justified in setting aside a verdict for the defendant as being against the weight of the evidence.

ARGUMENT

The following discussion is in answer to that portion of the plaintiff's argument entitled "Plaintiff's Claim Against Ship Owner" set forth at pages 17 through 27 of the Appellant's Brief.

1. The trial court did not err in giving the plaintiff's Requested Instruction No. 7.

The instruction was as follows:

"I instruct you that the shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not reasonably

fit for the purpose for which it was intended. This liability extends to longshoremen who work aboard the vessel and employ contracting stevedore companies. Even if the owner engaged others, such as the stevedore companies who supply equipment necessary for stevedoring operations, he must still answer to a longshoreman if the gear proves to be unseaworthy.

I further instruct you that *if the injuries to the plaintiff were caused by some malfunctioning in the rigging used for unloading the vessel or by some defect in the equipment used, or if there was improper use of the equipment by other longshoremen, the shipowner would be liable to the plaintiff for unseaworthiness. The obligation of providing seaworthy equipment is absolute and extends to all loading or unloading equipment used on the vessel.*" (R. IV, 278-279). (Italics added)

The defendant contends it was error to give that portion of the charge italicized above, for the reason that "malfunctioning in the rigging was not one of the specifications of unseaworthiness charged by plaintiff, nor was there any evidence that plaintiff's accident was caused by any such malfunctioning of the rigging. This instruction, in effect, advised the jury that it could make a finding of unseaworthiness on a specification neither alleged nor proved" (App. Br. 17).

The challenged instruction was not abstract or inapplicable to the issues and proof. The plaintiff contended, and there was evidence to support his con-

tention, that the vessel was unseaworthy because the pickup sling "was not provided with a proper hook or other securing device to keep it from slipping." (R. I, 13). This was, in effect, an allegation that the unloading gear was improperly rigged. Slipping of the steel bars from the pickup sling constituted a "mal-function" of the rigging in a very real sense.

Moreover, this Court, in common with other jurisdictions, is firmly committed to the view that the court's instructions to the jury must be read as a whole to determine if any particular instruction was prejudicial. Abstract instructions, even incorrect statements of the law, can be cured by the remainder of the charge. *Jesonis v. Oliver J. Olson & Co.*, 238 F.2d 307 (C.A. 9, 1956); *Van Camp Seafood Co. v. Nordyke*, 140 F.2d 902 (C.A. 9, 1944); *Bohle v. Matson Navigation Co.*, 243 Or. 196, 412 P.2d 367 (1966); *Fields v. Fields*, 213 Or. 522, 307 P.2d 528, 326 P.2d 451 (1958). "Even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge." *Sunkist Growers, Inc. v. Winckler and Smith Citrus Products Co.*, 284 F.2d 1 (C.A. 9, 1960).

Prior to the instruction complained of, the Court instructed the jury as follows:

"It is desirable that we first consider the action of Mr. Crawford against the steamship company, because how you decide that case will determine whether you reach the steamship company's action against the stevedoring company.

The plaintiff, Mr. Crawford, bases his claim upon unseaworthiness. He contends that the vessel JUDITH ANN, owned by the defendant, was unseaworthy in two respects. The first is, and I am quoting from the plaintiff's statement and contention, 'In that the cargo which plaintiff was required to discharge was improperly stowed, in that it was not properly blocked, in that the dunnage was insufficient and inadequate, in that it was necessary to use a pickup sling in order to discharge it, and in that it was so located that it could not be safely discharged.'

I instruct you that to be in a seaworthy condition means the cargo must be stowed in a condition reasonably suitable and fit for safe discharge from the vessel. The shipowner is not obligated to furnish an accident free ship. The standard is not perfection, but reasonable fitness.

The second contention is that, 'The pickup sling being used to discharge the vessel was not provided with a proper hook or other securing device to keep it from slipping.'

In order to recover on this claim, the plaintiff must prove by a preponderance of the evidence that the pickup sling in question was not reasonably suitable and fit for the intended purpose for which it was provided. The shipowner is not obligated to furnish or to have furnished a pickup sling, but it must be a reasonably fit one in light of the purpose for which it is to be used, giving due regard to the safety of the longshoremen.

In this case, the burden is on the plaintiff to establish by a preponderance of the evidence the

following facts: First, that the vessel was unseaworthy at the time and place in question in one of the particular respects which I have read to you. Second, that the unseaworthy condition was a proximate cause of some injury and consequent damage sustained by the plaintiff. . . .

[The Court then instructed the jury on the doctrine of unseaworthiness and continued:]

To apply the instruction I have just given you regarding unseaworthiness specifically to this case, if you find that the stowage of the cargo was improper and not in accordance with a reasonably safe and seaworthy manner of stowing the cargo, either by reason of the fact that the steel cargo which plaintiff was required to discharge was not properly blocked or was separated by insufficient or inadequate dunnage, or because it was necessary to use a pickup sling in order to discharge it, or because it was so located that it could not be safely discharged, then you will find that the vessel was unseaworthy by reason of said unsafe stowage, even if you find that there was nothing wrong with the vessel as such.

If you further find that by reason of this unsafe condition of stowage of the cargo which rendered the vessel unseaworthy, it became necessary to use a more dangerous method of unloading the cargo, and that plaintiff was injured as a proximate result thereof, then you will return your verdict in favor of the plaintiff and against the defendant." (R. IV, 274-278).

Immediately after giving these instructions, the Court gave the instruction upon which error is predicated.

The instructions, taken as a whole, made it perfectly clear to the jury that a finding of unseaworthiness had to be predicated on improper stowage or use of an improper pickup sling. The defendant's first specification of error has no merit.

2. The trial court did not err in giving plaintiff's Requested Instruction No. 8.

This instruction is as follows:

"You are instructed that the duties imposed upon the shipowners and the law in respect to the safety of employees are nondelegable; that is to say, the employer cannot delegate the performance of those duties to any other agent or employee. The defendant in this case cannot absolve itself of the performance of those duties, nor could it delegate the performance of them to employees, to the stevedore company nor to anyone else, but they adhere to the defendant shipowner without the possibility of suspension or interruption." (R. IV, 279; App. Br. 7).

The defendant's position on appeal is that: "The Court, in defining 'non-delegable,' mistakenly instructed that Shipowner could not delegate the *performance* of the duties in question to Stevedore or anyone else. Although it is true that the vessel owner cannot avoid the *responsibility* imposed upon it by such duties, there is no prohibition to the delegation of their performance. . . . The instruction had the effect of advising the jury that Shipowner's conduct in this respect was prohibited by law." (App. Br. 19).

The requested instruction was limited by its own terms to duties "in respect to the safety of employees." The instruction did no more than advise the jury that a shipowner cannot divest himself of the duty to provide a safe ship. The language does not even suggest that a shipowner cannot hire a stevedore to unload the vessel.

The lower court accurately disposed of the defendant's contention on this score when it said: "The defendant's exception in which Mr. Carlsen took one-half of one of my sentences and took it to be telling the jury that it was in some way unlawful for the shipowner to hire a stevedore, certainly, that would be a faulty instruction. *But I don't think anyone in this room has any idea that the jury may feel that this is the case.*" (R. IV, 300).

We have earlier quoted the instructions in which the court summarized the plaintiff's contentions of unseaworthiness and told the jury that recovery would have to be based on proof of such contentions. In addition, the court instructed at length, with respect to the third-party action for indemnity, upon the correlative duties of the shipowner and stevedore (R. IV, 285-289). It was assumed throughout those instructions that the shipowner had a right to hire a stevedore. No suggestion was made during the trial that it was in any way improper for the shipowner to employ longshoremen to unload the cargo. There was, in fact, testimony of the practice within the shipping industry for the ship's agent to hire a

master stevedore (R. IV, 212, 217, 218), and for the supercargo and ship's mate to supervise and oversee the work of longshoremen in unloading the vessel (R. III, 138-140; R. IV, 224).

The purpose of the requested instruction was to advise the jury that responsibility for unseaworthiness rests upon the shipowner, even though someone other than the shipowner may be at fault for creating the unsafe condition. *Johnson Line v. Maloney*, 243 F.2d 293 (C.A. 9, 1957); *Lahde v. Soc. Armadora Del Norte*, 220 F.2d 357 (C.A. 9, 1955). It was not the purpose of the instruction to suggest that a shipowner may not hire longshoremen. In view of the instructions and testimony as a whole, there is no possibility that the jury could have understood it to mean this. *Jesonis v. Oliver J. Olson & Co.*, 238 F.2d 307 (C.A. 9, 1956).

3. The trial court did not err in refusing to give defendant's Requested Instruction No. 24.

Defendant's Requested Instruction No. 24 was as follows:

"The plaintiff contends in this case that the ship was unseaworthy because of improper stowage of cargo. I instruct you that the method or manner of cargo stowage renders a vessel unseaworthy only when it results in an unreasonable hazard to the safety of the men required to work in and around the cargo. The mere fact that a particular manner of stowage requires more effort in order to discharge the cargo, or

requires the use of other and different equipment than may be customarily used for cargo discharge, does not make the vessel unseaworthy so long as methods and equipment are available which can be used to discharge the cargo without undue or unreasonable risk to the safety of those performing the work." (R. I, 72; App. Br. 7).

In support of the foregoing instruction, defendant argues in its brief: "The above requested instruction embodied one of the principal elements of Shipowner's theory of the case—i.e. that the cargo stow in question was in keeping with the usual and customary practice and that it did not pose any unreasonable risk of harm to the longshoreman engaged in the discharge *if proper methods and equipment were utilized by the master stevedore.*" (Italics are those of the defendant) (App. Br. 21).

The court would have committed prejudicial error had it given this instruction. It is not the *availability* of safe methods or equipment but the extent of their actual use aboard the ship which determines whether the vessel is seaworthy or unseaworthy. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944); *Waldron v. Moore-McCormick Lines, Inc.*, 386 U.S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482 (1967). If the plaintiff's requested instruction is correct, a longshoreman rarely, if ever, could predicate a claim for injuries upon a bad stow or the master stevedore's use of dangerous procedures or equipment. However, the maincurrent of admiralty law has been to expand, not eliminate, the doctrine

of unseaworthiness in these areas. *Gutierrez v. Watterman Steamship Corp.*, 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963); *Petterson v. Alaska Steamship Co.*, 347 U.S. 396, 75 S. Ct. 601, 98 L. Ed. 798 (1953); *Huff v. Matson Navigation Co.*, 338 F.2d 205 (C.A. 9, 1964). Indeed, since *Mascuilli v. United States*, 387 U.S. 237, 87 S. Ct. 1705, 18 L. Ed. 2d 743 (1967), the momentary negligent act of a fellow stevedore is sufficient to render the vessel liable for resulting injuries upon a theory of unseaworthiness. See *Candiano v. Moore-McCormick Lines, Inc.*, 382 F.2d 961 (C.A. 2, 1967).

In view of the inaccuracy of the requested instruction, it is not necessary to review the testimony claimed to support the instruction. We think it fair, however, to observe that just as the defendant's requested instruction does not correctly reflect applicable law, so also is its summary of the facts far from being an accurate reflection of the record. It is not true that "from the plaintiff's own witnesses it appears that whatever danger existed during the course of the discharge of this cargo was the direct result, not of the manner of stowage, but of the methods and equipment used in the discharge operation." (App. Br. 22). Witness Carl Sloan, a supercargo called by the plaintiff, testified that the use of any pickup sling to discharge steel is a dangerous procedure, but is necessary when the dunnage is inadequate to enable workmen to get hoisting slings around the loads as they lay on the floor of the hold (R. IV, 189-191). The witness testified that whenever it was

necessary to use a pickup sling, "The men tried to use a choker type of sling that bites around the load and increases the bite as the strain is put on by the gear, the lifting gear, to try to prevent the pickup sling from moving. But it's never really safe." (R. IV, 190, 191). The defendant's own expert witness, supercargo Winston B. Anderson, testified that a pickup sling, when used on steel, is in danger of slipping (R. IV, 229, 230).

It is not error to refuse a requested instruction which is partially incorrect. *Baltimore & Ohio Railroad Co. v. Felgenhauer*, 168 F.2d 12 (C.A. 8, 1948). However, to the extent that the defendant's requested instruction correctly stated the law, it was fully covered by the court's charge. The court instructed as follows:

"The plaintiff, Mr. Crawford, bases his claim upon unseaworthiness. He contends that the vessel JUDITH ANN, owned by the defendant, was unseaworthy in two respects. The first is, and I am quoting from the plaintiff's statement and contentions, 'in that the cargo which plaintiff was required to discharge was improperly stowed, in that it was not properly blocked, in that the dunnage was insufficient and inadequate, in that it was necessary to use a pickup sling in order to discharge it, and in that it was so located that it could not be safely discharged.'

I instruct you that to be in a seaworthy condition means the cargo must be stowed in a condition *reasonably suitable and fit*, for safe discharge from the vessel. The shipowner is not ob-

ligated to furnish an accident-free ship. The standard is not perfection, but *reasonable fitness*.

The second contention is that, 'the pickup sling was being used to discharge the vessel was not provided with a proper hook or other securing device to keep it from slipping.'

In order to recover on this claim, the plaintiff must prove by a preponderance of the evidence that the pickup sling in question was not *reasonably suitable and fit* for the intended purpose for which it was provided. The shipowner is not obligated to furnish or to have furnished a pickup sling, but it must be a *reasonably fit* one in light of the purpose for which it is to be used, *giving due regard to the safety of the longshoremen*.

.

Under the Maritime Law, every shipowner or operator owes to every longshoreman employed aboard a vessel the duty to keep and maintain the ship and stowage in a seaworthy condition at all times. To be in a seaworthy condition means to be in a condition *reasonably suitable and fit* for the purpose or use for which provided or intended. . . .

.

To apply the instruction I have just given you regarding unseaworthiness specifically to this case, if you find that the stowage of the cargo was improper and not in accordance with the *reasonably safe and seaworthy manner* of stowing the cargo, either by reason of the fact that the steel cargo which plaintiff was required to discharge was not properly blocked or was sep-

arated by insufficient or inadequate dunnage, or because it was necessary to use a pickup sling in order to discharge it, or because it was so located that it could not be safely discharged, then you will find that the vessel was unseaworthy by reason of said unsafe stowage, even if you find that there was nothing wrong with the vessel as such.

If you further find that by reason of this unsafe condition of stowage of the cargo which rendered the vessel unseaworthy, it became necessary to use a more dangerous method of unloading the cargo, and that plaintiff was injured as a proximate result thereof, then you will return your verdict in favor of the plaintiff and against the defendant.

I instruct you that the shipowner is liable for unseaworthiness, regardless of negligence, whenever the ship or its gear is not *reasonably fit* for the purpose for which it was intended. . . ." (R. VI, 274-278).

Again and again in the course of the foregoing charge the Court instructed that the standard by which the jury was to measure the seaworthiness of the stow and equipment was that of "reasonable fitness." The test formulated by the court was proper (See *Blassingill v. Waterman Steamship Corp.*, 336 F.2d 367, 370, ft. 4 (C.A. 9, 1964)) although it put the substance of the unobjectionable portions of the requested instruction in terms somewhat different than those suggested by the defendant. It is not error to refuse a requested instruction if its substance is

set forth in the instructions given. *Southern Pacific Company v. Souza*, 179 F.2d 691 (C.A. 9, 1950); *Van Camp Seafood Co. v. Nordyke*, 140 F.2d 902 (C.A. 9, 1944).

It is true that a party is entitled to have his theory of the case presented by appropriate instructions, subject, however, to the qualification that his theory must comply with the law. *Blassingill v. Waterman Steamship Corp.*, supra, 336 F.2d 367 (C.A. 9, 1964). To the extent that the defendant's Requested Instruction No. 24 was a correct statement of applicable law, it was included in the instructions given to the jury.

4. The trial court did not err in refusing to give the defendant's Requested Instruction No. 25.

This request was as follows:

"I instruct you that the fact that cargo is stowed in such a manner as to require the use of a pickup sling in order to discharge it does not render the vessel unseaworthy." (R. I, 73; App. Br. 8).

The basis for this requested instruction is set forth in the Appellant's Brief as follows:

"Shipowner requested this instruction in line with its theory that the cargo stowage here in question was not the source of the danger which led to plaintiff's accident and that, if any undue hazards were presented during the unloading operations, they were created by the discharge method and appliances chosen by Stevedore.

There was no evidence presented which would support the proposition that the employment of any type of pickup sling, under any and all circumstances and no matter how carefully used or what precautions taken, creates an unreasonable risk or hazard." (App. Br. 26).

The requested instruction directed the jury to find against the plaintiff upon the issue of an improper stow. It would have been reversible error to give such an instruction. The evidence strongly preponderated in favor of liability on this issue to the extent, in fact, that the court would have been justified in setting aside a verdict for the defendant as against the weight of the evidence. 6A Moore's Federal Practice § 59.08(5). No fewer than eight witnesses (one of them called by Brady-Hamilton Stevedore Co.) testified that the stow of rebar steel was improper and that it presented a hazard to longshoremen engaged in unloading the cargo (R. III, 59, 60, 72, 76, 81, 116, 129, 132, 134-136, 142, 143, 157, 169; R. IV, 182, 190, 197, 198, 242-244). The sole expert witness called by the defendant testified that better blocking could have been used (R. IV, 229, 230). There was testimony that a pickup sling had to be used to raise the steel three or four feet from the floor of the hold in order to get hoisting slings into position (R. III, 62, 63, 79-81, 116, 117). As noted in our discussion of the appellant's previous assignment of error, there was also testimony that it is dangerous to lift steel bars with any kind of pickup sling, although a choker type sling is preferable to a crade type sling

(R. IV, 190, 191). In fact, the expert witness called by the defendant, supercargo Winston B. Anderson, testified as follows:

“QUESTION: Now, the use of a pickup sling on steel, flexible steel, at best renders it dangerous, doesn't it, because it can slip?

ANSWER: There is always that possibility of it slipping.” (R. IV, 229, 230)

There was, in short, ample evidence that rebar steel stowed in such a manner as to require the use of a pickup sling to discharge it rendered the vessel unseaworthy. Even if the stevedore could arguably have used some technique for unloading the cargo more cautious than that employed, the ship would not be discharged from responsibility for an improper stow. *Hroncich v. American President Lines, Ltd.*, 334 F.2d 282, (C.A. 3, 1964); *Ferrante v. Swedish American Lines*, 331 F.2d 571 (C.A. 3, 1964); *Amador v. A/S J. Ludwig Mowinckels Rederi*, 224 F.2d 437 (C.A. 2, 1955); *Palazzolo v. Pan-Atlantic Steamship Corp.*, 211 F.2d 277 (C.A. 2, 1954). Accordingly, the court would have erred had it instructed the jury that “the fact that cargo is stowed in such a manner as to require the use of a pickup sling in order to discharge it does not render the vessel unseaworthy.”

CONCLUSION

The instructions with respect to the issues between the plaintiff and defendant were, if anything, too favorable to the defendant. In an excess of cau-

tion, the court instructed upon contributory negligence and comparative fault (R. IV, 280-282) and submitted the case to the jury upon general verdict forms (R. IV, 270; R. I, 81-84), even though, as the court recognized, there was no evidence whatever of contributory negligence (R. IV, 261-263). The defendant's appeal, insofar as it challenges the judgment obtained by the plaintiff, is completely without merit and the judgment of the lower court should be affirmed.

Respectfully submitted,

POZZI, LEVIN & WILSON
 RAYMOND J. CONBOY
 Attorneys for Plaintiff-Appellee
 Wayne Crawford.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RAYMOND J. CONBOY
 Attorney for Plaintiff-Appellee
 Wayne Crawford.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22184

JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD., a foreign
corporation,

Defendant and Third Party
Plaintiff-Appellant,

v.

WAYNE CRAWFORD,

Plaintiff-Appellee,

BRADY-HAMILTON STEVEDORE
COMPANY, a corporation,

Third Party Defendant-
Appellee

APPELLANT'S REPLY BRIEF

Appeal from the Final Judgment of the United
States District Court for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

KING, MILLER, ANDERSON, NASH & YERKE
CURTIS W. CUTSFORTH
1200 American Bank Building
Portland, Oregon 97205

Attorneys for Appellant

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APPELLANT'S REPLY BRIEF

Appeal from the Final Judgment of the United
States District Court for the District of Oregon.

THE HONORABLE ROBERT C. BELLONI, Judge

ARGUMENT

A. Plaintiff's Claim against Shipowner.

1. The trial court erred in giving plaintiff's
Requested Instruction No. 7.

This instruction told the jury that "if the in-
juries to the plaintiff were caused by some malfunctioning
in the rigging used for unloading the vessel" Shipowner
would be liable to the plaintiff for unseaworthiness.

Shipowner's objection is that malfunctioning in the rigging was clearly not one of the specifications of unseaworthiness charged by plaintiff. Moreover, there was no evidence that plaintiff's accident was in any way caused by any malfunctioning in the rigging. The jury was thus expressly advised that it might find liability on Shipowner's part upon a specification neither alleged nor proved.

Plaintiff's brief concedes that the charge of unseaworthiness relating to the rigging--that the sling being used "was not provided with a proper hook or other securing device to keep it from slipping"--is a charge of improper gear or rigging (Pl. Br. 13). Unseaworthiness due to the use or selection of improper gear, of course, is an entirely different thing than unseaworthiness resulting from the malfunctioning of properly selected gear.

Plaintiff's main argument here appears to be that the jury could not have been misled, in view of the trial court's instructions taken as a whole. Plaintiff quotes a statement referred to by this court in

Sunkist Growers, Inc. v. Winckler & Smith
Citrus Prod. Co. (CA9, 1960) 284 F2d 1,
Rev'd 370 US 19, 82 S Ct 1130, 8 Led2d 305

"Even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge."

However, plaintiff did not quote the ensuing language of this court, as follows:

"We agree with that general principle, yet if a substantial and prejudicial error is made in the giving of but one instruction, the verdict cannot stand." (284 F2d 23).

It may be that this instruction would not mislead experienced counsel or other persons familiar with the maritime terminology. However, it may well have misled a jury of laymen.

2. The trial court erred in giving plaintiff's Requested Instruction No. 8.

This instruction is as follows:

"You are instructed that the duties imposed upon the shipowners and the law in respect to the safety of employees are nondelegable; that is to say, the employer cannot delegate the performance of those duties to any other agent or employee. The defendant in this case cannot absolve itself of the performance of those duties, nor could it delegate the performance of them to employees, to the stevedore company, nor to anyone else, but they adhere to the defendant shipowner without the possibility of suspension or interruption." (Tr. 279).

It may be, as plaintiff's brief urges, that the purpose of this instruction "was to advise the jury that responsibility for unseaworthiness rests upon the Shipowner, even though someone other than the Shipowner may be at fault for creating the unsafe condition." However, the trial court did more than this. The trial court expressly directed the jury that Shipowner could not lawfully delegate the performance of the duties in question. After stating that Shipowner could not "absolve itself of the

performance of those duties"--which certainly indicates that the responsibility for such duties remains with Shipowner--the trial court went further and instructed "nor could it delegate the performance of them to employees, to the stevedore company nor to anyone else." If this latter clause means anything at all, it means that Shipowner could not properly or lawfully delegate or entrust to others the performance of such duties. All will agree that it was not the trial court's purpose to so advise the jury. The fact remains, however, that the jury was so instructed. Shipowner called the erroneous language to the attention of the trial court by timely exception but the jury was sent to its deliberations with this admonition unchanged.

Whatever assumptions the jury might otherwise have made concerning the propriety of Shipowner's delegation of the discharge operations to Stevedore, this instruction expressly labeled such delegation as improper. It follows that the jury's logical conclusion would be that Shipowner must necessarily be liable for any injury arising out of such improper delegation. Shipowner was obviously prejudiced by the giving of this instruction.

3. The trial court erred in failing to give Shipowner's Requested Instruction No. 24.

This instruction would have advised the jury as

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follows:

"The plaintiff contends in this case that the ship was unseaworthy because of improper stowage of cargo. I instruct you that the method or manner of cargo stowage renders a vessel unseaworthy only when it results in an unreasonable hazard to the safety of the men required to work in and around the cargo. The mere fact that a particular manner of stowage requires more effort in order to discharge the cargo, or requires the use of other and different equipment than may be customarily used for cargo discharge, does not make the vessel unseaworthy so long as methods and equipment are available which can be used to discharge the cargo without undue or unreasonable risk to the safety of those performing the work." (R. 72).

This instruction relates only to the charge of unseaworthiness based upon improper stowage. The standard embodied in the instruction--that stowage is unseaworthy when it results in an unreasonable risk or hazard to the safety of the men engaged in discharge--follows the holding of this court in

Blassingill v. Waterman Steamship Corp. (CA 9, 1964) 336 F2d 367

and we do not understand plaintiff to dispute its correctness.

Plaintiff, however, does argue that the instruction as a whole is erroneous, saying "It is not the availability of safe methods or equipment but the extent of their actual use aboard the ship which determines whether the vessel is seaworthy or unseaworthy." Plaintiff misses the point. Shipowner does not contend that a vessel which has available to it safe methods or equipment for discharge may not be

rendered unseaworthy by the failure to use them. What Shipowner is saying is that the failure to use an available safe method or appliance in effecting discharge of cargo does not thereby make the stowage unseaworthy.

The stowage of the subject vessel was alleged to constitute unseaworthiness. Shipowner denied this. Evidence was presented that the cargo stow in question was consistent with the usual and customary practice and that the manner of stowage did not pose an unreasonable risk of harm to those who would be engaged in the discharge. To be sure, plaintiff presented evidence to the contrary, mostly in the form of imprecise, subjective statements to the effect that the stow was "improper" and that it was "dangerous" to unload the cargo in the manner being employed.

As pointed out by witness Finley (Tr. 245) any-time a longshoreman goes aboard a ship to discharge heavy cargo, there is some danger of injury and longshoring, even under the best of conditions, is a "dangerous" job. It was therefore important that the jury be advised as to the appropriate standard to be used in determining whether the stow in this instance presented such degree of danger as to render the vessel unseaworthy.

The proper test, as seen, is whether an unreasonable risk of harm is presented. Whether a particular manner of

cargo stowage creates an unreasonable risk of harm can obviously be decided only in relation to the method or manner to be employed in the discharge. Where a method of discharge, using standard equipment and procedures, is available which will permit a reasonably safe unloading operation, it would be absurd to urge that the stow is unseaworthy. This is what the evidence relied upon by Shipowner tended to prove and the requested instruction would have told the jury that if such evidence was believed, the charge of unseaworthy stowage was not made out. It was Shipowner's right to have its theory of the case so presented to the jury. The failure to do so was doubly prejudicial to Shipowner here, where its indemnity right as against Stevedore quite likely was affected by the jury's finding on the charge of unseaworthy stowage.

4. The trial court erred in failing to give Shipowner's Requested Instruction No. 25.

This instruction would have advised the jury as follows:

"I instruct you that the fact that cargo is stowed in such a manner as to require the use of a pick-up sling in order to discharge it does not render the vessel unseaworthy." (R. 73).

As pointed out in Shipowner's opening brief, the evidence does not support the conclusion that the use of a pick-up sling, in and of itself, will necessarily render a discharge operation such as that involved here so

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unreasonably hazardous as to constitute unseaworthiness.

It stands undisputed in the record that methods of using the pick-up type sling were available which would have eliminated the hazards of which plaintiff complains (see Shipowner's opening brief, page 23). It follows that the mere stowage of cargo so as to require the use of a pick-up sling does not, without more, create a condition of unseaworthiness. Again, the crux of the matter is the method of using the sling. If an improper or unreasonably dangerous method is adopted then, of course, the vessel is rendered unseaworthy. This is not the equivalent of an unseaworthy stow.

The requested instruction did not, as plaintiff argues, remove the issue of unseaworthy stowage from the jury. It merely eliminated one of the several particulars which plaintiff contended rendered the stow unseaworthy, because such particular was not supported by the evidence. Shipowner was entitled to have the instruction given and it was error for the court to decline to do so.

B. Shipowner's Indemnity Claim against Stevedore

1. The trial court erred in denying Shipowner's motions for directed verdict and for judgment n.o.v. against Stevedore.

Stevedore concedes that the verdict in favor of plaintiff and against Shipowner was necessarily based on

a finding that the vessel was unseaworthy either because of the sling or the condition of cargo stowage (Stevedore's Br. 6). It is thus established in this case that Shipowner's liability to plaintiff resulted either

- 1) because the sling selected, furnished and used by Stevedore created an unreasonable risk of harm to Stevedore's employees engaged in the discharge operation, or
- 2) because the manner in which the cargo was stowed presented an unreasonable risk of harm to Stevedore's employees when they undertook to discharge it by the method and with the equipment utilized.

Stevedore then argues that even though Shipowner's liability resulted from Stevedore's selection and use of an unreasonably dangerous sling Stevedore could still be found to have performed its services in a safe and workmanlike manner.

Or, if it is assumed that Shipowner's liability stems from the unreasonable hazards presented by the cargo stow, Stevedore contends that it can be held to have fulfilled its warranty of safe and workmanlike service even though it is undisputed that, with full knowledge of all such hazards, it proceeded with the discharge operations, thereby continuing to expose its employees to such hazards.

Stevedore's argument is in direct contradiction with the opinions of this court and other courts which have considered the questions raised.

At the outset, Stevedore's principal contention that an award of indemnity requires an express jury finding that the Stevedore breached its warranty of safe and workmanlike service, and can never be allowed as a matter of law, is expressly put to rest by the decision of this court in

Seattle Stevedore Company v. Compania
Maritima (CA9, 1967) 373 F2d 9

In that case, where a similar contention was made, this court stated:

"Since Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc., 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732 (1964), there can be no reasonable doubt that the stevedore's implied warranty to the shipowner is governed by the same standard as and is coextensive with the shipowner's obligation to seamen and others in that category. There, the Court, in sustaining a judgment of indemnification for the shipowner against the stevedore, invoked the same test to determine whether the stevedore had breached his implied warranty of performance as it used in Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960) to determine whether a shipowner in a suit by a seaman had breached his duty to provide a seaworthy ship. Italia, 376 U.S. at 322, 84 S.Ct. at 753.

"Here, based upon the facts that the floor was uneven, that the rolls were heavy, and that only one track was used, the district court expressly found: 'Because of the manner in which this work was conducted under the supervision of the stevedore foreman, the vessel was unseaworthy.' These facts fully justify such a

finding, which is tantamount to a finding of a breach of the Stevedore's implied warranty.

"We hold that a stevedore who renders a vessel unseaworthy, by virtue of that very fact, breaches his warranty of workmanlike performance." (Emphasis supplied.)

The above quoted language, and also the decision therein referred to,

Italia Societa v. Oregon
Stevedoring Co., Inc. (1964)
376 US 315, 84 S Ct 748,
11 Led2d 732

make clear that the stevedore's implied warranty is "coextensive" with the shipowner's obligation to shipboard workers. This completely negates Stevedore's argument that the vessel could be rendered unseaworthy because of the sling furnished and used by Stevedore without there being a concurrent breach of Stevedore's implied warranty.

The same principle applies with respect to a ship owner's liability from unseaworthiness which, although initially created by it, is brought into play by the stevedore so as to result in injury. Clearly, there is just as much a failure by the stevedore to perform its work properly and safely when it knowingly exposes its employees to an existing, unreasonably dangerous condition as when it creates the condition in the first instance. The extensive list of cases cited in Shipowner's opening brief (pp 33-45) awarding or approving indemnity in such circumstances demonstrate conclusively that such is the law.

Stevedore's argument, similar to that attempted in connection with the sling, is that it could be found to have performed its contract in a proper manner regardless of the finding that an unreasonable risk of harm was presented to those undertaking to unload this particular cargo and the undisputed fact that Stevedore, with full knowledge of the risk thereby presented, nevertheless proceeded with the discharge and continued thereby to expose its employees to such risk. As Stevedore's brief puts it (pp 8-9) "The jury was easily justified in concluding the stevedore had not breached its contract; but, in fact, it had worked safely, expertly and in a workmanlike manner."

It is, of course, impossible to comprehend how proceeding with work which subjects one's employees to an unreasonable risk of harm could ever be characterized as working "safely and expertly." Stevedore cites no authority in support of this remarkable proposition and, it is submitted, there is none.

Stevedore appears to suggest that the question of whether a stevedore has breached its warranty of safe and workmanlike service is, in every case, a question of fact. It is asserted that a jury determination of such question is always guaranteed in a diversity case, under

Atlanta & Gulf Stevedores v. Ellerman Lines, Ltd. (1962) 369 US 355, 82 S Ct 780, 76 Led2d 798

That decision does not support Stevedore's

argument. In that case the plaintiff longshoreman was injured when a bale of burlap fell on him during unloading. The bales were being removed by means of hooks fastened to metal bands which were strapped around the bales. The plaintiff sued the vessel owner, asserting unseaworthiness by reason of defective bands and negligence in using bale hooks and in failing to provide a safe place to work. The ship owner impleaded the stevedore, seeking indemnity for any liability that might result on the plaintiff's claim. The jury returned a verdict for the plaintiff and a verdict against the ship owner on its indemnity claim. On appeal, the Third Circuit affirmed the judgment for the plaintiff but reversed the judgment in favor of the stevedore on the basis that a finding of negligence on either ground charged would necessarily mean that the stevedore had breached its obligation of workmanlike service. The Supreme Court, on certiorari, reversed the Court of Appeals and reinstated the judgment in favor of the stevedore. It did so, not because it disagreed with the reasoning of the Court of Appeals that a jury finding of negligence against the ship on either of the two grounds asserted would mean that the ship was entitled to indemnity as a matter of law, but because the verdict against the ship conceivably could have been based solely upon the unseaworthiness charge (defective bands) for which the

stevedore would not be responsible.

The decision is actually strong authority for Shipowner's position in the instant case. For it is implicit in the holding that, had the plaintiff's claim been limited to the two charges of negligence (which, incidentally, bear a strong similarity to the two charges of unseaworthiness in the case at bar--(1) use of an improper unloading appliance and (2) unsafe working area due to improper stowage) a finding for the plaintiff on either ground would necessarily carry with it the conclusion that the stevedore had breached its obligation.

Stevedore also argues that the instant case is somehow to be distinguished from the many "proceeding with the work in the face of known danger" cases cited by Shipowner because here the method of discharge employed by Stevedore was the only "practicable" one. Stevedore's brief states (p 8), "There was no evidence that stopping work offered a reasonable alternative."

The obvious rejoinder, of course, is that cessation of the work is always required, and is the only permissible alternative, when to continue is to subject the workmen to an unreasonable risk of harm (which must be taken as established if the finding of unseaworthiness is assumed). Stevedore's argument that it need not stop work, and could proceed with impunity to expose its employees to a dangerous condition if there were no other

practicable method of discharge was expressly disapproved by this court in

Crescent Wharf & Warehouse v. Compania
Naviera De Baja Calif. (CA9, 1966)
366 F2d 714, 719

Moreover, Stevedore's conclusion that there was no way whatever to alleviate the hazard presented, and that the only alternative was to leave the cargo in the vessel forever, is clearly fanciful. The record contains considerable evidence of methods and procedures which would have eliminated or reduced the risk. The use of a choker type sling was suggested (Tr. 83, 165, 167-8), as was using the ship's winches, rather than dockside cranes (Tr. 162). Witness Cowan testified that the proper method of discharging cargo of this type with a cradle type sling was to lift it only a very few inches with the pickup sling and then to put blocks under it, rather than to raise the load three or four feet as was being done when plaintiff was injured (Tr. 156).

Even if it is believed that none of these methods would satisfactorily reduce the hazard, there still remains no evidence that other methods and equipment were not available which would do so. The testimony that the method being used was the only "practicable" one had reference, in that context, to economic practicability. Obviously, there exist means whereby this cargo could have

been removed without unreasonably endangering the lives or persons of anyone. The simplest way, perhaps, would be simply to cut the bands with which the steel rods were bundled and remove the rods individually, one at a time. Certainly, no heavy sling load of metal would fall on anything or anybody if this were done.

That method, and others of varying degrees of elaborateness, might well be more expensive--i.e. less practicable--than the means customarily employed. But that is not Stevedore's concern. A stevedore always has the option of stopping the work and leaving it up to the ship to resolve the problem. Further, as stated in

Hugev v. Dampskisaktieselskabet International
(DC Cal, 1959) 170 F Supp 601, aff'd (CA9, 1960)
274 F2d 875 cert denied 363 US 803, 80 S Ct
1237, 4 Fed2d 1147

"The stevedoring contractor knows that the ship has been at sea; that she may be in many respects dangerous to the life and limb of an unskilled person; that if a condition is found which is unsafe for the professional longshoreman, as a rule the contractor can remedy it at the expense of the shipowner; that if the stevedoring operations are thereby delayed, the shipowner normally must pay for standby time." (Emphasis supplied, page 610)

Economic practicalities were not a problem to Stevedore in this case, in any event. The stevedoring contract between Shipowner and Stevedore (Ex. 31, Sections IX G and H) expressly provided that where the cargo was not in good order, or in cases where it was necessary to handle cargo under special conditions, extra compensation

was to be paid Stevedore.

With respect to Stevedore's argument that a directed verdict on the indemnity issue is never proper, it is interesting to note that one of the cases cited in Stevedore's brief,

Old Dominion Stevedoring Corp. v. Polskie
Linie Oceaniczne (CA4, 1967) 386 F2d 193

holds precisely the opposite. In that case the plaintiff received a jury verdict against the shipowner, on the basis of which the court entered judgment for indemnity over against the stevedore. The questions raised, as seen from the court's own statement, were quite similar to those presented here:

"We next consider Old Dominion's appeal from the court's entry of a directed verdict against it on the issue of indemnity. It is the stevedore's contention that the shipowner brought about the defect which caused plaintiff's injury and since it was aware of such defect the stevedore should not be made to indemnify the shipowner. It is also argued that the jury should have passed on the issue of whether the stevedore failed to perform its operation in a workmanlike manner." (Emphasis supplied, page 196).

The court, in affirming the entry of a directed verdict against the stevedore stated:

"It is undisputed that the stevedore had knowledge of the unseaworthy condition and did nothing to remedy it despite its opportunity to do so. The stevedore permitted its men to work in the hold after it knew of the presence of the syrup and this set the unseaworthy condition into play.

"Thus it is clear that the law permits a stevedore to be held liable to indemnify the shipowner where it has knowledge of an unseaworthy condition or brings such conditions into play.

* * *

"In applying these principles to the instant case we reach the conclusion that the court was correct in directing a verdict for the shipowner against the stevedore. Three witnesses, all employees of Old Dominion, testified clearly and without equivocation that they observed a sticky substance on the deck where they were working. One of these, Wilson, admitted that he possessed the authority to have the work stopped and to order the substance removed. Applying the law as discussed above, we are of the firm opinion that there could have been only one reasonable conclusion as to the verdict. The credibility of these witnesses was not in question. Giving the stevedore the benefit of every inference that may reasonably be drawn from the evidence we are still left with the inescapable conclusion that its knowledge of the presence of the slippery substance on the deck of the hold rendered it liable for failure to perform its job properly and safely, and in breach of its implied warranty of performance of its undertaking in a workmanlike manner. There was no factual controversy which the jury had to decide for the facts were clear and undisputed." (Emphasis supplied, pages 197-198)

Another case where a directed verdict of indemnity (after a jury verdict against the shipowner) was held to be proper is

Mortensen v. A/S Glittre
(CA2, 1965) 348 F2d 383

The cases of

Mosely v. Cia. Mar Adra S.A. (CA2, 1966)
362 F2d 118

and

Caputo v. U.S. Lines Company (CA2, 1963)
311 F2d 413, cert. denied 374 US 833,
83 S Ct 1871, 10 Led 1055

both cited in Shipowner's opening brief, also hold that, under circumstances similar to those in the instance case, the shipowner is entitled to indemnity against the stevedore as a matter of law. Stevedore's only response to these decisions is to suggest that they are either wrong or forgetful (Stevedore's Br. 11, 12). In fact, they are neither. A directed verdict was proper in the cases referred to, as in the present case, because there is no real factual issue for determination under the state of the evidence.

2. The trial court erred in failing to give Shipowner's Requested Instructions 18, 19, 21 and 22.

Stevedore's only response to Shipowner's claim of error based upon the trial court's failure to give the indicated instructions appears to be that the instructions so requested are incorrect. For example, Requested Instruction 18, which was to the effect that if the jury found against Shipowner because the sling furnished by Stevedore was inadequate or unsafe, the Shipowner was entitled to indemnity, is criticized as omitting "the essential element of breach of contract by substandard performance" (Stevedore's Br. 12).

Reference to this court's decision in the

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311 F2d 413, cert. denied 374 US 833,
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Reference to this court's decision in the

Seattle Stevedore Company case, cited above at page 10, will show that the instruction is practically a paraphrase of the "coextensive" rule which is there so clearly set out. That is, if a vessel is rendered unseaworthy by the stevedore--in this example, by furnishing and using an inadequate or unsafe sling--the stevedore has breached his warranty of workmanlike performance "by virtue of that very fact." Assuming that some reason existed (which it did not) why a directed verdict should not have been given, this and the other requested instructions on the indemnity issue should clearly have been given. The failure to do so, in the context of this case, was extremely prejudicial to Shipowner. For an additional case so holding, see

Sea-Land Service, Inc. v. Matson Terminal Co.
(Cal App, 1967) 61 Cal Rptr 756

3. The trial court erred in failing to submit the factual issues to the jury by means of the requested special verdict form.

Stevedore states that the trial court here rejected the request for a special verdict because of the difficulties of application. Shipowner respectfully suggests that, on the contrary, the difficulties have been created by the failure to follow this court's admonition with reference to the use of special interrogatories in this type of case.

CONCLUSION

Based upon the foregoing, Shipowner respectfully urges that the judgment below in favor of plaintiff be vacated and a new trial ordered as between plaintiff and Shipowner; that the judgment below in favor of Stevedore and against Shipowner be reversed and judgment entered in favor of Shipowner on its indemnity claim; in the event the court determines that Shipowner is not entitled to entry of judgment on its indemnity claim, the indemnity case be remanded for new trial.

Respectfully submitted,

KING, MILLER, ANDERSON, NASH & YERKE

CURTIS W. CUTSFORTH

1200 American Bank Building
Portland, Oregon 97205

Attorneys for Defendant-Appellant
JUDITH ANN LIBERIAN TRANSPORT
CORPORATION, LTD.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

CURTIS W. CUTSFORTH
Of Attorneys for Appellant

